NO. 87-1603

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH A. ROMANO

Petitioner,

VERSUS

MERRILL LYNCH, PIERCE, FENNER & SMITH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a United States District Judge possess the power to exercise the judicial authority of a judge of a United States Circuit Court of Appeals in the absence of appointment by the President and confirmation by the Senate granting him such authority?

2. Is an appellant denied equal protection of the law and his civil rights when a district judge sits by designation on a circuit court and authors the opinion of the court of appeal which affirms a judgment by a fellow district judge, with whom he participates in meetings to formulate local rules that establish special pleading in cases brought under jurisdiction the Racketeer Influenced and Corrupt Organizations Act (RICO), i,e. the District Court's standing RICO order.

3. Was the district court's application of a one-year prescriptive period to petitioner's RICO claims harmless error because of a failure to properly allege a RICO cause of action?

4. Did petitioner's second amended complaint sufficiently state a claim arising under RICO?

5. Is a plaintiff alleging a civil claim arising under RICO subject to pleading requirements other than the notice pleading established by Congress?

6. When does a churning claim against a broker accrue so as to be barred by the statute of limitations?

7. Is a motion for summary judgment properly granted where plaintiff's deposition shows that issues of fact exist regarding unauthorized trading by the broker who receives special compensation from the issuer of the shares which were traded without authorization?

QUESTIONS PRESENTED FOR REVIEW (continued)

8. Can commodities trades be made predicate acts under RICO?

9. Is it a breach of a broker's fiduciary duty to his customers for the broker to fail to disclose that it has been named as a defendant in a civil action alleging the broker to be a co-conspirator in an attempt to manipulate the price of silver, the Market in which the broker's customer was trading and suffered losses?

10. Was class certification properly denied?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the FIfth Circuit affirming the judgment of the United States District Court for the Eastern District of Louisiana (hereinafter referred to as the district court) is reported at 834 F.2d 523. It appears in Appendix A to this petition.

The several district court decisions are attached as Appendix B,C,D,E,F one of which is reported at 638 F. Supp. 269.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 29, 1987. No application for rehearing was filed. This petition is filed within 90 days thereof.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisisons of this article.

2. SECTION 1961,1962, 1964 OF TITLE 18, UNITED STATES CODE

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one

year. (B) any act which is indictable under any of the following provisisons of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling business), sections 2315 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or

instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is a least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been

involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document record, recording or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agnecy so designated may use is investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

SECTION 1962 OF TITLE 18. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the

purchaser, the members of his immediate family, and his or their accomplices in any patern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foriegn commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections[1] (a), (b), or (c) of this section.

SECTION 1964 OF TITLE 18. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foriegn commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

SECTION 78j OF TITLE 15. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

~~(a)~~ To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SECTION 6b OF TITLE 7. Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities

It shall be unlawful (1) for any member of a contract market, or for any correspondent agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to decieve or attempt to decieve such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of

agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price; *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Nothing in this section shall apply to any activity that occurs on a board of trade, exchange, or market, or clearinghouse for such board of trade, exchange, or market, located outside the United States, or territories or possessions of the United States, involving any contract of sale of a commodity for future delivery that is made, or to be made, on or subject to the rules of such board of trade, exchange, or market.

Section 6k. of Title 7. Registration of associates of futures commission merchants, commodity pool operators, and commodity trading advisors; required disclosure of disqualifications

(1) It shall be unlawful for any person to be associated with a futures commission merchant as a partner, officer, or employee, or to be associated with an introducing broker as a partner, officer, employee, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation or acceptance of customers' orders (other than in a clerical capacity) or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this chapter as an associated person of such futures commission merchant or of such introducing broker and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a futures commission merchant or introducing broker to permit such a person to become or remain associated with the futures commission merchant or introducing broker in any such capcity if such futures commission merchant or introducing broker knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, or introducing broker (and such registration is not suspended or revoked) need not also register under this paragraph.

(2) It shall be unlawful for any person to be associated with a commodity pool operator as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or

persons so engaged, unless such person is registered with the Commission under this chapter as an associated person of such commodity pool operator and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a commodity pool operator to permit such a person to become or remain associated with the commodity pool operator in any such capacity if the commodity pool operator knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of suspension has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, introducing broker, commodity pool operator, or as an associated person of another category of registrant under this section (and such registration is not suspended or revoked) need not also register under this paragraph. The commission may exempt any person or class of persons from having to register under this paragraph by rule, regulation or order.

(3) It shall be unlawful for any person to be associated with a commodity trading advisor as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of a client's or prospective client's discretionary account or (ii) the supervision of any person or persons so engaged, unless such person is registered with the Commission under this chapter as an associated person of such commodity trading advisor and such registration shall not have expired, been suspended (and the period of suspension has not expired), or been revoked. It shall be unlawful for a commodity trading advisor to permit such a person to become or remain asssociated with the commodity trading advisor in any such capacity if the commodity trading advisor knew or should have known that such person was not so registered or that such registration had expired, been suspended (and the period of

suspension has not expired), or been revoked. Any individual who is registered as a floor broker, futures commission merchant, introducing broker, commodity trading advisor, or as an associated person of another category of registrant under this section (and such registration is not suspended or revoked) need not also register under this paragraph. The Commission may exempt any person or class of persons from having to register under this paragraph by rule, regulation, or order.

(4) Any person desiring to be registered as an associated person of a futures commission merchant, of an introducing broker, of a commodity pool operator, or of a commodity trading advisor shall make application to the Commission in the form and manner prescribed by the Commission, giving such information and facts as the Commission may deem necessary concerning the applicant. Such person, when registered hereunder, shall likewise continue to report and furnish to the Commission such information as the Commission may require. Such registration shall expire at such time as the Commission may by rule, regulation, or order prescribe.

(5) It shall be unlawful for any registrant to permit a person to become or remain an associated person of such registrant, if the registrant knew or should have known of facts regarding such associated person that are set forth as statutory disqualifications in section 12a(2) of this title, unless such registrant has notified the Commission of such facts and the Commission has determined that such person should be registered or temporarily licensed.

STATEMENT OF THE CASE

On July 12, 1984, the original complaint was filed as an action seeking judgment for damages arising from a breach of fiduciary obligations on a Commodities Futures

Contract Brokerage account. Upon the Court's granting defendants' Motion for a more definite statement, plaintiff filed his Amended Complaint on October 12, 1984, particularizing each and every transaction giving rise to the special damages of plaintiff. On April 30, 1986, the plaintiff filed his Seconded Amended Complaint which corrected certain inaccuracies in the original Complaint as well as added claims under RICO. Plaintiff's claims are primarily for transactions in the silver futures contract market.

On September 30, 1985, Summary Judgment was granted in favor of defendants, Merrill Lynch Ready Assests Trust, (MLRAT), and Merrill Lynch Asset Management, Inc., (MLAM), dismissing them from the action. Furthermore, in that same Order, a partial Summary Judgment was granted in favor of defendants, Merrill Lynch, Pierce, Fenner & Smith, Inc., (MLPF&S), Merrill Lynch Futures, Inc., (MLF), and Merrill Lynch Commodities, Inc., (MLC), dismissing some of plaintiff's claims as time - barred. The Order denying the Motion of plaintiff for certification of this matter as a class action was entered on December 9, 1985. Plaintiff's RICO claims and Rule 10(b)5 claims were dismissed by an Order entered on July 1, 1986; thereafter, on September 12, 1986, a Motion for Summary Judgment in favor of MLPF&S, MLC AND MLF was granted dismissing all of plaintiff's causes of action for churning or other commodities violations based upon transactions occurring or actions taken more than two years prior to the filing of the suit. Final Judgment was entered on December 29, 1986, dismissing plaintiff's Complaint with prejudice, plaintiff to bear all costs. On December 29, 1987, the United States Court, of Appeal for the Fifth Circuit affirmed.

Joseph A. Romano (hereafter plaintiff) opened a stock and commodities trading account with defendant, MLPF&S, on March 12, 1981. Plaintiff placed $10,000.00 in the possession of MLPF&S as plaintiff's initial deposit to begin trading. With the initial deposit, MLPF&S purchased on behalf of plaintiff 10,000 shares issued by MLRAT.

The purchases on behalf of plaintiff of shares of MLRAT was made by MLPF&S without the knowledge or consent of the plaintiff. The defendants presented no evidence to contradict or rebutt the testimony of the plaintiff on this fact. As a result of the aforedescribed purchase on behalf of plaintiff of shares in Ready Assets, plaintiff became a shareholder of Merrill Lynch Ready Assets Trust.

A ficuciary relationship exists between plaintiff and MLPF&S. MLPF&S is a party defendant in a civil action entitled *Minpeco v. Contincommodity Services, Inc.*, et al,, 552 F. Supp. 327, 332; 558 F.Supp. 1348 (1983) which named MLPF&S as a co-conspirator which participated in an alleged market manipulation of silver futures contracts resulting in artificially high prices of silver. The last citation is to the District Court's decision dismissing the RICO part of that case; however, after the decision in *Sedima*, infra, the District Judge reversed himself and reinstated the RICO claim. The defendant, MLPF&S, breached its fiduciary relationship with plaintiff, by failing to disclose the said defendant's involvement in market activity in silver futures contracts which activity was alleged to have been a conspiracy to manipulate the price of silver and monopolize the silver market. The plaintiff was trading in silver futures contracts at a time when the market was moving downward to seek its free market level. The plaintiff's losses were caused by his trading long in silver futures contracts during that time. The defendant, MLPF&S, had knowledge in their possession which, if disclosed to the plaintiff, would have deterred him from making investments long in silver futures. The failure to disclose by the said defendant was a material breach of the fiduciary relationship and a direct cause of plaintiff's losses.

Plaintiff lacked sophistication as an investor, considering his level of knowledge, intelligence, business judgment and market objectives. MLPF&S acted, and consequently voluntarily assumed the role of, an investment advisor to the plaintiff. The defendants' account executives

made false and misleading statements to the plaintiff that if he continued to maintain a position in silver there would be no risk involved because the defendant, MLPF&S, would sell to plaintiff a "no-risk contract". It was not disclosed to the plaintiff that the defendant, MLPF&S, was a defendant in a civil action alleging that the said defendant was a conspirator participating in alleged market minipulations of silver futures contracts. Had that been disclosed to the plaintiff, he would not have traded in silver.

REASONS FOR ALLOWING THE WRIT

A. Summary of the Argument

A United States District Judge cannot exercise the judicial authority of a circuit judge because that power can only be obtained through appointment by the President and confirmation by the Senate.

The several judges of the United States District Court for the Eastern DIstrict of Louisiana have promulgated local rules requiring special pleadings in RICO cases. Because of their common interest in RICO cases, one district judge cannot author the circuit court of appeal opinion without denying the appellant equal protection of the laws.

The defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., had interlocking argreements with the Merrill Lynch Ready Assets Trust. Under that agreement, the broker, the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., received fees from the defendant, Merrill Lynch Ready Assets Trust for selling shares of the Trust. The amount of those fees was determined by the average daily balance in the Trust.

The defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., was far greater concerned about itself and an increase in the average daily balance in the Trust than it

was about its fiduciary duty to the plaintiff. Consequently, plaintiff was set adrift in an ocean of intertwining securities transactions and commodities trading which left him baffled and unable to extricate himself from the jungle of paper surrounding him. The argument is simple, a fiduciary must act in the best interests of its principal and cannot neglect to disclose material information. The broker, Merrill Lunch, Pierce, Fenner & Smith, Inc., neglected to disclose to the plaintiff all of the market activity in which itself was involved; furthemore, the broker had been named in a lawsuit alleging that the broker had conspired to manipulate the market price of silver.

It is clear that the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., used plaintiff's deposits intended to be his initial investment to increase the size of the Merrill Lynch Ready Assets Trust for the benefit of itself. That the broker gains benefits from the Trust with this agreement is not even contested. Had the broker paid the necessary attention to its customer, the plaintiff would not have traded in silver and would not have lost money.

The intertwining agreements between the defendants constitutes a pattern of racketeering wherein the Merrill Lynch Ready Assets Trust is the enterprise by which benefits are created. This was done at the expense of the plaintiff and without regard to the necessary disclosure to him about the broker's market activity in silver. Additionally, the purchases of the shares of the trust were done without the authority of the plaintiff. Consequently, the plaintiff's money was used solely to increase the average daily balance in the trust to benefit the broker. There is no evidence in the record, showing any benefit to the plaintiff resulting from the purchase and sales of shares in the Merrill Lynch Ready Assets Trust.

As such, that kind of activity falls within the prohibition of the RICO Act. Consequently, the plaintiff is entitled to treble damages for all of the losses which he sustained in trading under insufficient disclosure, as well as attorney's fees.

Because plaintiff is not the only one who suffered, this case should be certified as one to proceed by way of a class action.

B. Argument amplifying the Reasons

This Court has recently held that where an appellate judge who authors an opinion has an interest in the case, the litigant is denied equal protection and due process of the law. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580 (1986). In the case below, a district judge authored the opinion of the Court of Appeal. That judge is from the same district court bench as the judge whose opinion he affirmed. Both of those district judges have common interests in this case by virtue of their participation with each other in meetings to adopt local rules of Court. One of those local rules is the "standing RICO order" requiring special pleadings in RICO cases.

Plaintiff's RICO claim was originally dismissed as time barred; however, the district judge who authored the court appeal decision affirmed the dismissal on the basis of insufficient pleadings. As such he ruled on a matter which was not before the court of appeals and as though he were sitting as a district judge enforcing the standing RICO order. Plaintiff was thereby denied the equal protection of the laws and due process because of the author's interest in establishing precedent in favor of strict pleading requirements in RICO cases.

Plaintiff's second amended complaint pleaded his RICO claim in terms sufficient enough to permit a defense of prescription to be raised, and ruled upon, by the trial judge. How, then, can it be said that the pleadings were insufficient and the case dismissed on that basis?

This Court has said that where the trial judge is able to rule on the issues presented, there is no defect in the

pleadings. *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 62 L.Ed.2d 441, 100 S. Ct. 502 (1980).

The defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., is a party defendant in the civil action entitled *Minpeco v. Conticommodity Services, Inc., et al*, 552 F. Supp. 327, 332, which names MLPF&S as a co-conspirator which participated in an alleged market manipulation of silver futures contracts resulting in artificially high prices for silver. That action is proceeding under the jurisdiction of RICO, 558 F. Supp. 1348 (1983) which was reversed and the RICO cliam reinstated after the decision in *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275. Additionally, that same case is proceeding by way of a class action in a companion case filed in the same court entitled *Gordon v. Hunt, et al*, 98 F.R.D. 573 (1983).

The burden of proof of the plaintiff is governed by a preponderance-of-the-evidence standard. They need only prove that it is more likely than not that they were defrauded to recover. This Court rejected the "clear and convincing" evidence rule with respect to securities transactions in civil actions to recover damages and other express civil remedies. *Herman and MacLean vs. Huddleston*, 459 U.S. 375, 103 S. Ct. 683, 74 L. Ed. 2d 548.

Recently the United States Court of Appeal for the Fifth Circuit decided the case of *Magnum Corp. v. Lehman Bros. Kuhn Loeb, Inc.* 794 F. 2d 198, Case No. 85-2511. That case determined that a plaintiff was entitled to recover for damages which he suffered as the result of the broker's failure to disclose to it's customer the broker's activity in the market in which the customer is trading. That case unequivocally held:

> "The relationship between a securities broker and it's customer is that of principal and agent, See, e.g., *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F. Supp. 107, 110 . . . 453 F. 2d 417 (5th Cir. 1972), and '[t]he relationship between agent and principal is a fiduciary relation-

> ship. . . the implicit agreement between customer and stockbroker is that the latter will use reasonable efforts to execute the order promptly at the best obtainable price. The law imposes upon the broker the duty to disclose to the customer information that is material and relevant to the order. . ."

It is uncontradicted that Merrill Lynch did not disclose to the plaintiff that they had been named as a defendant in a civil action alleging them to be a co-conspirator in an attempt to manupulate the price of silver. *Minpeco,* supra. Accordingly, the plaintiff is entitled to recover all of the losses which he sustained by reason of the broker's failure to disclose, because had he known he would not have bought silver.

The reason for plaintiffs arrival in the federal courthouse can be found in the analysis of the law and its application in *Weiser v. Schwartz,* 286 F. Supp. 389, relative to the Louisiana prescription period of one year applicable to actions for fraud. The case involved a claim for losses resulting from the alleged improper handling of an investors account by his broker.

The facts of *Weiser,* supra, are remarkably similar, if not identical, to the facts before the Court. Plaintiff had four different lawyers; additionally he attempted to get the defendants to respond and acount for their actions. The plaintiff was put off or given meaningless answers. The findings of fact of *Weiser,* supra, are related at page 391 and include the following:

> "Schwartz continued to handle plaintiff's account until January, 1966. *No trades were made in plaintiffs behalf after February 1, 1966.*
>
> During the period 1958-1966, plaintiff was furnished daily confirmation slips on each trade made in his account and monthly statements of his account. *All of these were received more than one year before suit was filed on May 16, 1967.*
>
> * * * * *

> Ultimately, when it became clear that his capital had fallen sharply, Weiser became dissatisfied and complained to Schwartz and Kohlmeyer & Company. *In addition, he later spoke to four different lawyers about handling his claim.* However, it was not until his present attorney had plaintiff's account audited--within a year before suit was filed--that Weiser had any evidence on which he could assert a claim that his account had been improperly handled other than the fact that he had lost money." (Emphasis added)

Plaintiff shows these same reasons. Fifteen and one-half months elasped after the last trade in *Weiser,* supra, before suit was filed.

The analysis of the brokers position in *Weiser,* supra, is at page 392:

> "Defendants urge that plaintiff is barred here *because plaintiff had knowledge more than one year before this suit was filed of all the trades made in his behalf by the defendants.* They contend that such knowledge was sufficient to contitute the 'discovery' required by *Bailey v. Glover,* supra, to commence the running of the statute of limitations for an action based on fraud.
>
> * * * * *
>
> However, this case involves a claim for churning, and *it is not self-evident,* as the defendents suggest, *that the statute began to run when the plaintiff knew of each trade;* it is the volume of trading and the nature of the trading, considered in the light of the plaintiffs investment objectives, that constitute the legal wrong." (Emphasis added)

The conclusions given for the denial of the motion are:

> "Even if a purely objective standard of diligence is to be applied, the information available to plaintiff more than one year before this suit was instituted was not sufficient to put the hypothetical reasonable man on inquiry to protect his rights insofar as the alleged churning was concerned. The facts available to plaintiff would put only a sophisticated investor on inquiry. In such situations, a plaintiff is peculiarly dependant on the professioal knowledge and skill of his broker. Therefore, the motion to dismiss the claim for churning on the ground that it is barred by the statute of limitations is denied."

Clearly, where the volume of trading is at issue each individual trade is meaningless and very little can be learned about the relationship of the parties without further inquiry. The action cannot accrue until all of the pieces of the puzzle can be examined and a true picture comes into focus.

Weiser, supra, was cited with approval in *Dzenits v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 494 F.2d 168 (1974) wherein the United States Court of Appeals, Tenth Circuit, citing the leading Ninth Circuit case, *Hecht v. Harris, Upham*, 430 F.2d 1202 at p. 1210, said:

> 'For example, because churning is conduct which is not common to the experience of the ordinary individual, it is consequently not easily recognizable to unsophisticated investors. *Several courts have held that the mere receipt of confirmation slips recording the date of every security transaction does not in itself provide sufficient notice of churning activity* to alert an investor otherwise unaware that the frequency and volume of such trading might be considered excessive." *Hecht v. Harris, Upham*, supra; *Stephens v. Abbot, Proctor and Paine*, supra; (Emphasis added)

In the case of *Mineco v. Conticommodity Services*,

Inc., et al, 552 F.Supp. 327 (1982), the defendant Merrill Lynch, Pierce, Fenner & Smith, is alleged to have conspired with other defendants to monopolize the silver market and to artificially boost the price of silver; furthermore, the RICO claim which was originally dismissed was reinstated after *Sedima,* supra.

A class action was certified in a companion case on July 19, 1983. *Gordon v. Hunt, et al* 98 F.R.D. 573 (1983), limited to those persons who sold silver futures contracts short on market during the period named plaintiff traded. Plaintiff herein, is not a member of the class; however, plaintiff would be a member of the class of persons who sold silver futures long during the time after manipulation when the prices were returning to their free-market range. Plaintiff's claim clearly encompasses damages suffered by market manipulation. *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 102 S. Ct. 1825; 456 U.S. 353; 72 L.Ed.2d 182.

CONCLUSION

The district judge imposed the "Clear and convincing", or stricter, burden of proof upon plaintiff in granting defendants' motions for summary judgment. The court of appeals sanctioned this requirement that appellant must show fraudulent concealment to defeat the motion. (See Appendix A, P. A-4, footnote 6). The imposition of that burden of proof is in conflict with this Court's decision in *Herman and Mac Lean v. Huddlestson,* supra.

The district judge sitting by designation, who authored the court of appeal opinion, commented, in footnote 8, that appellant did not seriously attack the district court's ruling insofar as ". . . claims based on churning the commodities account could not form the predicate acts of RICO violations. . ." This Court should be incredulous of that comment in the face of appellant's reply brief (pp. A-52 & 53 Appendix H) specifically addressing that issue and

and including a copy of the RICO pleading (pp. A-56-A-61 Appendix I)

Likewise, this Court should be incredulous of the entire section of the court of appeal opinion entitled "C. NO EVIDENCE OF CHURNING VIOLATION". (Appendix A pp. A-10-11) *All of petitioner's claims for churning had been dismissed by summary judgment prior to trial on the merits.* (Appendix E p. A-37) Petitioner, thus had no basis for coming forward with expert testimony at the trial on the merits relative to churning claims.

Furthemore, this Court should be incredulous of the district court's classification of the unauthorized purchase and sale of MLRAT shares by MLPF&S as a mere technicality (Appendix D A-23, A-31 footnote 9); and, which position was sanctioned by the court of appeals (Appendix D p. A-3 footnote 4). Such a position is contrary to the very advice given to petitioners by the investment advisor, MLAM. (See appellant's reply brief, Appendix H p. A-51)

This Honorable Court should issue its Writ of Certiorari to review the Summary Judgments entered in favor of the defendants, Merrill Lynch Ready Assets Trust and Merrill Lynch Asset Management, Inc., the Partial Summary Judgments rendered in favor of Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Futures, Inc., and Merrill Lynch Commodities, Inc.; and determine that plaintiff's claims be recognized as valid RICO cliams, as well as valid claims under the Securities Exchange Act, based upon and arising out of conduct in violation of Section 10 of the Securities Exchange Act, 15 U.S.C. Section 78j and SEC Rule 10b-5, 17 C.F.R. 240 10b-5, the Commodities Exchange Act, 7 U.S.C. Section 1, et seq, Section 25 (c) and Section 13; and further to review whether or not the case should be certified to proceed as a class action without the requirement of notice to members of the class and certified under Rule 23(b)(1)(A) and (B).

This Honorable Court should further review whether or not the plaintiff, Joseph A. Romano, is entitled to an award of damages in the amount of $44,601.00, and further review whether or not petitioner, Joseph A. Romano, is entltled to treble that award under the provisions of the RICO statute and additionally, to an award of attorney's fees and all costs of these proceedings.

Respectfully submitted,

STEPHEN J. CAIRE
Attorney for Petitioner
Joseph A. Romano

APPENDIX A

ROMANO V. MERRILL LYNCH, PIERCE, FENNER & SMITH

Joseph A. ROMANO
Plaintiff-Appellant,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, et al.,
Defendants-Appellees.

No. 87-3069.

United States Court of Appeals,
Fifth Circuit.
Dec. 29, 1987.

Investor sued commodities and future brokers alleging securities fraud and RICO violations. On brokers' motions to dismiss, the United States District Court for the Eastern District of Louisiana, 638 F. Supp. 269, Charles Schwartz, Jr., J., dismissed various claims. After dismissal of other claims, investor appealed. The Court of Appeals, Feldman, District Judge, sitting by designation, held that: (1) trust that was no-load money market mutual fund and investment manager for unincorporated trust were not liable to investor, who could not identify any loss resulting from purchase or redemption of trust shares, but could only allege and prove losses flowing from commodities transactions; (2) investor did not lack notice of churning cliams sufficiently to toll prescriptive period; (3) investor had not established elements of churning claim; and (4) broker did not breach its fiduciary duty to investor by failing to disclose its own activity in silver futures market in which investor was investing.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RANDALL and DAVIS, Circuit Judges and FELDMAN*, District Judge.

FELDMAN, District Judge:

This appeal is taken from the district court's dismissal of various securities and commodities violations claims and denial of class certification. We affirm the district court.

I. BACKGROUND

Joseph A. Romano brought this action on behalf of himself and other "involuntary" Merrill Lynch Ready Assets Trust customers alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. In connection with his claims of commodities churning[1] and impermissible trading on margin, Romano sued a host of Merrill Lynch & Co. affiliates: Merrill Lynch, Pierce, Fenner & Smith is a wholly-owned broakerage subsidiary; Merrill Lynch Ready Assets Trust is a "no-load" money market mutual fund which invests primarily in short-term money market securities;[2] Merrill Lynch Assets Management, Inc. is the investment manager for the unincorporated trust and other Merrill Lynch mutual funds. Mr. Romano also named two wholly-owned subsidiaries, Merrill Lynch

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* District Judge for the Eastern District of Louisiana, sitting by designation.

[1] Churning occurs when a broker "enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests." *Miley v. Oppenheimer & Company*, 637 F.2d 318, 324 (5th Cir. 1981).

[2] The parties accept the general description of each entity's role in the Merrill Lynch organization as set forth in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 528 F.Supp. 1038, 1041 (S.D.N.Y. 1981), aff'd, 694 F.2d 923 (2nd Cir. 1982), *cert, denied*, 461 U.S. 906, 103 S.Ct. 1877, 76 L.Ed.2d 808 (1983).

Commodities, Inc.[3] and Merrill Lynch Futures, Inc. Thereafter, he amended his complaint to add violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

Although appellant's arguments here are as elusive as were his assertions of misconduct before the district court, certain facts emerge.

Romano opened a commodities trading account with Merrill Lynch, Pierce, Fenner & Smith (MLPF & S) on March 12, 1981 with a deposit of $10,000. He claims MLPF & S then placed his $10,000 in an interest-bearing money market account, Merrill Lynch Ready Assets Trust (MLRAT), but did so without authorization from him. What followed was a series of deposits and withdrawals from the Ready Assets account for investment in the silver futures market on appellant's behalf. Both types of transactions, the silver commodities trading and the associated deposits and withdrawals from MLRAT[4], occurred between March 1981 and April 1983. Apparently dissatisfied with the results of his trading, appellant ordered the liquidation of his account and brought this suit. In addition to the 10b-5, RICO and churning[5] violations, appellant alleged that MLPF & S breached its fiduciary duty by failing to disclose its own market activity in silver futures

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[3] On January 4, 1983, Merrill Lynch Commodities, Inc. changed its name to Merrill Lynch Futures, Inc.

[4] It is undisputed that the Ready Assets transactions are technically securities transactions.

[5] As the district court noted, a churning allegation makes little sense in the context of the Ready Assets transactions. Conspicuously absent is an itemization of the deposits and withdrawals from the Ready Assets account which would support a claim for churning. Indeed, the gist of Romano's complaint with regard to his Ready Assets account was that his deposit was placed in an interest-bearing account without his authorization, in lieu of being frozen in a noninterest-bearing account, pending investment in the silver futures market. In any event, not surprisingly, appellant's claims based on Ready Assets transactions must fail due to his inability to allege any damage resulting from MLPF & S' action.

contracts. Furthemore, appellant claimed that MLPF & S account executives made unauthorized commodity sales and purchases, failed to properly execute appellant's orders, and failed to disclose a complete listing of activity in appellant's account.

Several rulings followed in motion practice.

[1] Defendants Merrill Lynch Ready Assets Trust and Merrill Lynch Assets Management moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. On December 6, 1985, the district court granted summary judgment in favor of MLRAT and MLAM because Romano could show no loss from the Ready Assets transactions, and failed to state a basis for liability for the commodities losses alleged. At the same time, the court granted partial summary judgment in favor of MLPF & S, Merrill Lynch Futures, and Merrill Lynch Commodities as to certain of the 10b-5 claims which were prescribed on the face of the complaint.[6] In addition, the trial court denied class certification of this action. On July 1, 1986, after ample time for discovery, the district court dismissed the prescribed 10b-5 and RICO claims for failure to show fraudelent concealment[7], 638 F.Supp. 269. Dismissal of the RICO claims was further appropriate because appellant failed to allege predicate acts upon which a pattern of

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[6] The district court specifically gave appellant the opportunity to show fraudulent concealment of any alleged deceitful conduct which would operate to toll the statute of limitations. *See Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974).

[7] While the district court's application of a one-year prescriptive period to RICO claims is now outdated in light of the Supreme Court's recent pronouncement, *Agency Holding Corporation v. Malley-Duff & Associates, Inc.*, — U.S. —, 107 S.Ct. 2759, 2767, 97 L.Ed.2d 121 (1987), the error is harmless in view of appellant's failure to properly allege a RICO cause of action.

racketeering activity could be based.[8] On September 12, 1986, the district court dismissed those commodities churning claims which had prescribed due to Romano's failure to show lack of notice of the commodities violations. But the court purposely declined to specify which claims had prescribed in order to give Romano still one more opportunity to develop proof at trial. After trial on the merits, the court found that Romano had failed to prove either his commodities churning claim or his breach of fiduciary duty claim. The district court then granted defendants motion to dismiss based on Federal Rule of Civil Procedure 41(b). This appeal followed.

II. ISSUES ON APPEAL

Romano raises the following issues on appeal: (1) Whether the dismissal of Merrill Lynch Ready Assets Trust and Merrill Lynch Ready Assets Management was appropriate; (2) Whether the district court erred in applying the statute of limitations to appellant's churning claims; (3) Whether the evidence supported the district court's finding that no churning violation occurred; (4) Whether the district court erred in finding that defendants had not breached any fiduciary duty owed to Romano; and (5) whether denial of class certification was proper.

A. DISMISSAL OF MLRAT AND MLAM

[2] The granting of summary judgment pursuant to

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[8] The district court found that because commodities trades are not securities transactions, the claims based on churning the commodities account could not form the predicate acts of RICO violations. In view of the complete failure of proof on churning, we need not reach the correctness of the court's ruling which, we note, was not seriously attacked on appeal in any event. Since Romano could show not damage flowing from the Ready Assets transactions, his securities claims were similaarly deficient for RICO purposes.

Rule 56[9] of the Federal Rules of Civil Procedure is appropriate when, viewed in the light most favorable to the opposing party, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Phillips Oil Company v. OKC Corporation*, 812 F.2d 265, 272 (5th Cir.1987). On review, this Court applies the same legal standard in determining whether summary judgment was proper. *Id.* The Supreme Court instructs that the inquiry involved in ruling on a motion for summary judgment "necessarily implicates the substantive evidentiary burden of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). Therefore, "the judge must view the evidence presented through the prism of the substantive evidentiary burden" that the parties would bear at trial. *Id.*, 106 S.Ct. at 2513.

[3] After careful review of the record before us, we conclude that the evidence presented, even viewed in the light most favorable to appellant, is not "such that a [fact-finder] . . . could reasonably find" for Mr. Romano. 106 S.Ct. at 2514. Given the uncontroverted description of each Merrill Lynch entity's role in the transactions which form the subject of the complaint, it is clear that neither the ready Assets Trust nor the Assets Management division could be liable for the losses at issue. It is uncontested that MLPF & S maintained two accounts on appellant's behalf: (1) account number 594-18328, the Ready Assets account into which appellant's funds were deposited pending investment in the commodites market, and (2) account number 594-18456, the commodities account. Romano did not, and in fact could not, identify any loss resulting from

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[9] Rule 56(c) provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c).

the purchase or redemption of Ready Assets shares.[10] Instead, he could only allege and prove losses flowing from the commodities transactions. The record is clear that neither MLRAT nor MLAM was in any way even remotely involved in Mr. Romano's silver futures trades. Mr. Romano's investment activity in the commodities market was handled exclusively by account executives for MLPF & S, Merrill Lynch Futures, and Merrill Lynch Commodities. Given the absence of "evidence favoring the nonmoving party [sufficient] for a [factfinder] to return a verdict for that party," summary judgment was clearly appropriate. 106 S.Ct. at 2511.

B. PRESCRIPTION AND THE CHURNING CAUSE OF ACTION

On defendants' motion for summary judgment, the district court dismissed as prescribed that portion of the commodities churning claim based on transaction that occurred prior to March 1983.[11]

This Court, like the district court, acknowledges that the statute of limitations does not begin to run until "the aggrieved party has either actual knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof." *First Federal Savings & Loan Association of Miami v. Mortgage Corporation*, 650 F.2d 1376, 1378 (5th Cir.1981). A churning cause of action may be particularly difficult to detect if the customer is an unsophisticated investor:

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[10] Since the Ready Assets Trust was an interest-bearing account, it appears that Mr. Romano actually realized some gain from MLPF & S' investment decision.

[11] Romano does not attack the district court's application of a two-year limitations period as guided by Louisiana Securities Laws and the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* *See also* 7 U.S.C. § 25(d).

> . . . because churning is conduct which is not common to the experience of the ordinary individual, it is consequently not easily recognizable to unsophisticated investors.

Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 494 F.2d 168, 172 (10th Cir.1974).

Because of the character of the offense, churning is not limited to a single transaction. As we have stated before:

> Churning is a unified offense: there is no single transaction, or limited, identifiable group of trades, which can be said to constitute churning. Rather, a finding of churning, by the very nature of the offense, can only be based on a hindsight analysis of the entire history of a broker's management of an account and of his pattern of trading that portfolio, in comparison to the needs and desires of an investor.

Miley v. Oppenheimer & Company, 637 F.2d 318, 327 (5th Cir.1981).

[4,5] Therefore, it is apparent that in applying the limitations period to a churning cause of action, one must consider the entirety of the transactions in question and the degree of investor sophistication. Our review of the record reveals no evidence that Romano lacked notice of his churning claims so as to toll the prescriptive period. Indeed, the evidence points the other way.

[6] Mr. Romano received monthly statements reflecting all account activity during each preceding month. Merrill Lynch also regularly sent him confirmation notices of trading in his commodity account. He received open order confirmation notices and commodity margin call reminders. We recognize that receipt of such statements alone does not constitute notice of a churning claim as a

matter of law:

> Several courts have held that the mere receipt of confirmation slips recording the date of every security transaction does not in itself provide sufficient notice of churning activity to alert an investor otherwise unaware that the frequency and volume of such trading might be considered excessive. 494 F.2d at 172.

However, in this case and on this record we find that Romano was sufficiently apprised of the brokers activities.[12] Mr. Romano was not an unsophisticated investor who was caught unaware of the significance of his commodity account activity. We stress that he himself directed and controlled his nondiscretionary account. When given ample opportunity[13] to present facts tending to show ignorance or confusion regarding his churning claim, Romano could only make the naked assertion that he was unaware of the violation as of July 1983. Clearly, a party opposing summary judgment cannot rest on such a conclusory allegation when it is unsupported by facts placed before the trial court. We noted in *Fontenot v. Upjohn Company,* 780 F.2d 1190, 1195-96 (5th Cir.1986):

> Absent evidence, direct, circumstantial, or inferential, that would create a genuine issue of fact, and absent any suggesttion concerning the

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12 Appearing as *amicus curiae,* the Commodity Futures Trading Commission expressed concern that the district court effectively ruled that the receipt of confirmation slips constitutes notice of churning violations as a matter of law. We do not hold, nor would it be correct to do so, that receipt of confirmation slips and the like constitutes notice as a matter of law. Our decision today is fact-specific and deals only with the facts in this record. The district court also ruled only on the facts.

13 The district court generously allowed Romano an additional six months for discovery before definitively ruling on the prescription claim.

> utility of additional time for further discovery, the motion should be granted.

Id. at 1196. Thus we find that, on these facts, the district court's grant of summary judgment on the prescription issue was proper.

C. NO EVIDENCE OF CHURNING VIOLATION

[7] The essential elements of a claim for churning are certain and have been clearly articulated. To prevail on a churning claim the investor must prove that:

> (1) the trading in his account was excessive in light of his investment objectives: (2) the broker in question exercised control over the trading in the account; and (3) the broker acted with the intent to defraud or with willful and reckless disregard for the investor's interests.

Miley v. Oppenheimer & Company, 637 F.2d 318, 324 (5th Cir.1981).

After trial on the merits, the district court found that Romano had failed to establish any one of these three elements. We do not disturb the district court's finding as there is no clear error. The record is noticeably barren of any evidence tending to show excessive trading in Mr. Romano's commodity account in view of his investment objectives. By his own admission, he believed that investing in the silver futures market would be profitable. Mr. Romano testified that he reviewed the silver reports in the newspaper on a daily basis during his period of activity in the market. Guided by this information, he directed the purchase and sale of silver futures. The record reflects that it was Mr. Romano, not his broker, who exercised control over his commodity account. The investment decisions were his; the account was nondiscretionary. Similarly

absolutely no evidence in the record establishes that the broker acted with intent to defraud or in reckless disregard of Mr. Romano's interests. In fact, quite to the contrary, defendants made investment recommendations aimed at recouping Romano's silver losses. Thus, the district court correctly granted the motion to dismiss at trial. Romano simply failed to prove the elements of his case. Dismissal under Federal Rule of Civil Procedure 41(b)[14]

> is warranted when the district court, even before hearing the defendant's evidence, determines that the plaintiff has failed to offer persuasive evidence regarding the necessary elements of his case.

DuPont v. Southern National Bank of Houston, Texas, 771 F.2d 874, 879 (5th Cir. 1985), *cert. denied*, 475 U.S. 1085, 106 S.Ct.1467, 89 L.Ed.2d 723 (1986).

D. NO EVIDENCE OF BREACH OF FIDUCIARY DUTY

[8,9] Appellant asserted that Merrill Lynch breached its fiduciary duty by failing to disclose its own activity in the silver furtures market. Although the district court held that defendants owed Romano no fiduciary duty, we hold that a broker does owe his client a fiduciary duty, but on

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14 Rule 41(b) provides in relevant part:
After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.
Fed.R.Civ.P. 41(b).

these facts, no duty was breached.

[10] It is clear that the nature of the fiduciary duty owed will vary, depending on the relationship between the broker and the investor. Such determination is necessarily particularly fact-based. and although courts draw no bright-line distinction between the fiduciary duty owed customers regarding discretionary as opposed to non-discretionary accounts, the nature of the account is a factor to be considered:

> . . . the CFTC has stated that the duty to disclose information about risk will vary depending on the circunstances and the nature of the relationship between the broker and the customer . . . ..

Clayton Brokerage Company v. Commodity Futures Trading Commission, 794 F.2d 573, 582 (11th Cir.1986). The evaluation "requires consideration of the degree of trust placed in the broker and the intelligence and personality of the customer." *Id.*

We have already noted that Mr. Romano controlled his commodity account. His broker had no authority to make independent investment decisions, but instead acted solely at Romano's direction. Mr. Romano was an alert and vigilant businessman who daily received and assessed the silver futures market. Because of Mr. Romano's control over his nondiscretionary account and his ability to make investment decisions, we find that defendants did not breach the fiduciary duty they owed. *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F.Supp. 107, 113 (N.D.Ala. 1971), *aff'd.*, 453 F.2d 417 (5th Cir.1972). *See also Hill v. Bache Halsey Stuart Shields, Inc.*, 790 F.2d 817, 824 (10th Cir.1986). *See generally Limbaugh v. Merrill Lynch, Pierce, Fenner & Smith*, 732 F.2d 859, 862 (11th Cir.1984); *Shearson Hayden Stone, Inc. v. Leach*, 583 F.2d 367, 371-72 (7th Cir.1978).

E. DENIAL OF CLASS CERTIFICATION

[11] Federal Rule of Civil Procedure 23(a) sets forth the requirements for class certification:

> One or more member of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Romano again failed on all counts. Mr. Romano defined potential members of the class as those Merrill Lynch customers whose funds were placed in Ready Assets Trust without authority, pending investment by Merrill Lynch in the commodities market. However, he could not identify a single customer fitting that class description. Clearly, neither questions of fact nor defenses would be common to the class. Given the nature of the claim, adjudication would require a highly specialized inquiry into the relationship between each customer and his account executive, and an examination of the individual investmnet objectives of the client. Appellant could not fairly and adequately protect the class for two reasons: He could show no loss resulting from the Ready Assets transactions, and many class members would, as the district court felt, prefer to realize a return on their fund prior to investment. Romano relied only on rank speculation and conclusory assertions to support his claim to class relief, and the district court properly denied class certification.

Thus, we AFFIRM the district court.

APPENDIX B

MINUTE ENTRY
SEPTEMBER 26, 1985
SCHWARTZ, J.

Filed
Sept 27, 85

JOSEPH A. ROMANO

V.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, ET AL.

SECTION "A"

This matter is before the Court upon motion of Merrill Lynch Ready Assets Trust and Merrill Lynch Assets Management, Inc. for summary judgment; motion for partial summary judgment on behalf of Merrill Lynch, Pierce, Fenner & Smitth, Merrill Lynch Futures, Inc. and Merrill Lynch Commodities Inc.; and motion of Plaintiff for certification of this matter as a class action. The motions of Merrill Lynch Ready Assets Trust and Merrill Lynch Assets Management, Inc., for summary judgment are hereby GRANTED, and the motion for partial summary judgment is hereby GRANTED insofar as it seeks dismissal of Rule 10b-5 claims in respect of transactions occurring more than two years prior to the filing of this litigation. Order and Reasons shall follow with regard to the foregoing motions and with regard to the plaintiff's motion for certification of class, which is under submission in light of memoranda, exhibits and oral argument presented to the Court.

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DATE OF ENTRY SEP 30 1985

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH A. ROMANO — CIVIL ACTION

V. — NO. 84-3424

MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL. — SECTION "A"

ORDER AND REASONS

This matter is before the Court upon motion of Merrill Lynch Ready Assets Trust ["Ready Assets"] and Merrill Lynch Assets Management, Inc. ["MLAM"], for summary judgment; motion for partial summary judgment filed by Merrill Lynch, Pierce, Fenner & Smith ["MLPF&S"], Merrill Lynch Futures, Inc. and Merrill Lynch Commodities Inc.; and motion of plaintiff for certification of this matter as a class action. In support of the motion for class certification, plaintiff submitted into evidence various exhibits to the motion papers.

Factural Background

Plaintiff alleges numerous violations of federal securities laws, including general allegations of churning and impermissible trading on margin. From the complaint, as amended, and the motion papers, the plaintiff alleges two types of securities transactions are in question: (1) Purchase and redemption of shares in Ready Assets and (2) Trading in connection with various commodities. As apparent from the pleading and confirmed in oral argument before the Court, monetary losses were sustained only in connection with commodities trading, and more specifically in silver trading[1] Plaintiff further complains that his

DATE OF ENTRY DEC 9 1985

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[1] Certain correspondence and memoranda attached to movants' papers show that on or about February 25, 1983, plaintiff bought silver at the suggestion of a MLPF&S account executive and sold it almost immediately at his own instigation, thereby sustaining a $2081.06 loss. No other losses or transactions have been placed at issue at this time.

funds were deposited into Ready Assets without his authorization in lieu of being held in a noninterest bearing account pending investment. However, he has alleged no damages resulting from the Ready Assets transactions.

For the foregoing acts, plaintiff alleges the following are liable: Ready Assets (an unincorporated trust); MALM (investment manager for the trust and other ML mutual funds); MLPF&S, (the broker/subsidiary of Merrill Lynch, Inc.); ML Commodities, Inc.; and ML Futures, Inc.[2]

The first issue before the Court is whether this action should be certified to proceed as a class action. In making this determination, the Court is of course bound by the standards set forth in Federal Rules of Civil Procedure Rule 23.

Under Rule 23(a), the first determination the Court the must make is whether the purported class is so numerous that joinder of all members is impracticable. In this case, plaintiff has not identified any class member other than himself. The only potential class would be those customers of MLPF&S whose money was put in Ready Assets without their authority pending the investment of such funds by and/or under the direction of MLPF&S in the commodities market. However, no class member other than plaintiff has been established.

The burden is on the plaintiff to prove that a class exists and that an action on its behalf should be maintained. *See* 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1759 at p. 578 (1972). This Court has previously given plaintiff a continuance of the class certification questions in order for him to accomplish discovery pertinent to the class action issues, but the plaintiff has been unable to

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[2] For a general description of each entity's rule inn the Merrill Lynch organization, see *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 528 F.Supp. 1038 (S.D.N.Y. 1981), *aff'd* 699 F.2d 923 (2d Cir. 1982), as confirmed by the uncontroverted affidavit of Robert Harris.

sustain his burden of identifying any class members. This is not at all surprising to the Court in light of the enormous number of MLPF&S customers, many of whom may well wish their money to be deposited in Ready Assets pending other investments, to obtain the benefits of the higher interest rates available to Ready Assets investors, as will be discussed more fully below. Moreover, identifying any such class members would require an awesome understanding of determining the states of mind of the innumerable MLPF&S customers who have invested in Ready Assets. Accordingly, the Court finds plaintiff has not established entitlement to a class action under Rule 23(a)(1).

The Court is further required to determine whether under Rule 23(a)(2) there are questions of law or fact common to the class. Assessment of this factor in this case overlaps with the determination under Rule 23(a)(3) whether the claims or defenses of the parites are typical of the claims or defenses of the class and with the determination under Rule 23(a)(4) whether the plaintiff will adequately and fairly protect the interests of the class. In considering the merits of the motions for summary judgment filed by Ready Assets and MLAM, the Court has perceived this matter primarily as an action against MLPF&S account executives who allegedly misled plaintiff, by fraud and/or negligence, into investing in the commodities marker, with a resulting loss to plaintiff. The Court will therefore be required to determine particularized questions as to the identity of the account executives with whom plaintiff dealt, as to the content of the alleged misrepresentations and/or erroneous advice, and whether such misrepresentations or advice caused the losses in question. There is the further question whether or to what extent plaintiff was advised by individual account executives at MLPF&S regarding deposit of this funds in Ready Assets pending ther investment in the commodities market.

All of these issues require a highly individualized examination of the communications between the parties and

the understanding of the parties on either side of this dispute as to how plaintiff's funds were to be invested and what procedures would be followed. Plaintiff has made no showing that these claims or defenses are typicall of any potential claims of other MLPF&S customers. Plaintiff has neither alleged nor established any policy or directive in effect at the times in question, which overall policy or directive resulted in the commodities trading losses forming the basis of this lawsuit. In fact, plaintiff's claims and interests may run counter to those of a majority of MLPF&S investors, who would wish to have any return on their investments maximized by deposits in Ready Assets, rather than holding their funds in a noninterest bearing account pending investment in the commodities market or other securities. Investors other than plaintiff may well question any practice by defendants not maximizing return on investments, including a failure to deposit funds in Ready Assets accounts pending other investment. According, plaintiff has not satisfied the remaining requirements of Rule 23(a) and such requirements of numerousity, commonality of questions of law or fact, typicality and adequate and fair representation, are all necessary prerequisites to a class action.

The Court, however, has nonetheless continued to eximine the requirements of Rule 23(b) to determine whether, if the prerequisites of paragraph (a) were satisfied, plaintiff has in addition satisfied an of the requirements of Rule 23&b?. Subsection (A) of Rule 23(b)(1) was included to protect the defendant from the threat of incompatible or varying adjudications in multiple lawsuits. *See* 7A Wright & Miller, *supra*, § 1773. Subsection (B) was designed to protect absent parties where a grant or denial of relief to a litigant might adversely effect their interests. *Id.* at § 1774. As an example of action falling within Rule 23(b)(1), defendants have cited an attack on the validity of bond issues on the same ground or complaints of landowners of a nuisance affecting all of them. By contrast, this case is not one to which Subsection (A) and (B) would apply, in that each

alleged class member would have his own case to present, as alluded above in discussing the requirements of Rule 23(a). Thus, a judicial determination as to any acts or omissions made by one MLPF&S account executive vis-a-vis the plaintiff would not affect any other determination of acts and ommissions affecting any other customer of defendants. No contention may be made that Rule 23(b)(2) applies to this case.

Under Rule 23(b)(3), the Court also finds that questions of law or fact common to the members of the class do *not* predominate over any question affecting individual members. No policy, directive, or standardized communication has been alleged or shown by the plaintiff in order to justify a class action. As indicated above, this action concerns alleged negligence and/or misrepresentations regarding the handling of plaintiff's account only. For all the foregoing reasons, the Court finds that plaintiff has not sustained his burden of establishing entitlement to a class action under Rule 23.

Having disposed of the class action allegations, the Court will now address the remaining questions whether Ready Assets and MLAM should be dismissed from this action and whether certain of the claims against MLPF&S, ML Futures and ML Commodities have prescribed. In support of the motions for summary judgment, defendants submitted the affidavit of Robert Harris, Vice President of MLAM, and various discovery responses and documents.

In order to demonstrate that there are triable issues of fact, plaintiff must produce documentary evidence or sworn testimony contradicting the defendants' submissions. Although plaintiff submitted various documents to the Court, certain material facts remain uncontested, either due to the absence of conflicting evidence or due to plaintiff's admissions and allegations.

Thus, it is uncontested that there were two accounts maintained on plaintiff's behalf with MLPF&S, account no.

594-18328, the Ready Assets account into which plaintiff's funds were deposited pending investment in the commodities market and account no. 594-18456, the commodities account. See Plaintiff's Complaint, p. 7, ¶ 21. Defendants allege plaintiff's funds were deposited into the Ready Assets account so they would not lie idle pending investment in commodities and analogize the Ready Assets Trust to a bank account. See also ¶ 6 of Defendants' Uncontested Material Facts, to which plaintiff has admitted. Neither Ready Assets nor MLAM ever invested plaintiff's funds in the commodities market.

Ready Assets accouunts can be opened by investors either through a MLPF&S account executive, through another brokerage house having a dealer agreement with Ready Assets, or directly through the Bank of New York, the trust's custodian. MLPF&S entered into a dealer agreement by which MLPF&S executives can enter orders for clients to purchase or redeem Ready Assets shares.

MLAM operates and manages Ready Assets. Ready Assets invests in short term money market securities and does not maintain a staff. There is no claim, nor could there be in this case, of any mismanagement in trust fund investments causing a depreciation in Ready Assets shares.

MLAM also provides investment admisory services to individual and institutional investors that have entered into a written advisory agreement with MLAM. Plaintiff admits he had no such investment advisory contract with MLAM and admits that Ready Assets has never provided investment advisory or protfolio analysis services to any shareholder in Ready Assets, as to the advisability, suitability or timing of commodities trades or other investments. MLAM has never acted as an investment advisor to Ready Assets with regard to commodity futures transactions, nor has MLAM ever purchased commodities for its own account or for the account of its shareholders. Plaintiff's investment decisions in the commodities market

were handled through account executives employed by MLPF&S, ML Commodities and ML Futures.

In light of the foregoing, the Court concludes that there is no basis for liability on the part of Ready Assets or MLAM for the losses here at issue. Plaintiff has not controverted movants' assertions that neither MLAM nor Ready Assets had any obligation to provide investment advice to plaintiff regarding the purchase and sale of commodities futures contracts or any other type of investment. Moreover, plaintiff has not controverted movants' assertions that neither Ready Assets nor MLAM had any obligation to advise plaintiff regarding the purchase and sale of Ready Assets shares, as to which in any event no loses were sustained by plaintiff. The Court thus concludes that those entities had no involvement in the actions or decisions leading to plaintiff's alleged losses in connection with his commodities trading. Therefore, movants Ready Assets and MLAM are entitled to summary judgment in their favor, dismissing them from this action, there being no material facts in dispute and movants being entitled to judgment as a matter of law.

With regard to the prescription issues, pertinent facts are that plaintiff filed suit on July 12, 1984. The dates of the transactions in question are listed in ¶ 42 of plaintiff's amending ans supplemental complaint.

Movants assert that plaintiff's claims of violations of Rule 10b-5 are subject to a two year prescriptive period by analogy to L.S.A.-R.S. 51:715(E). *See Dupuy v. Dupuy,* 551 F.2d 1005, 1023 n.31, *reh. denied,* 554 F.2d 1065 (5th Cir.), *cert. denied,* 434 U.S. 911, 98 S. Ct. 312 (1977). Thus, on the face of the complaint, any misrepresentations subject to Rule 10b-5 in respect of transactions occurring more than two years prior to July 12, 1984, are time-barred under *Dupuy.*

In opposition to movants' claim of prescription, plaintiff argues that his claim for churning is a fraud claim

and alleges that discovery is necessary into the dates plaintiff became aware of the fraud, under the doctrine of fraudulent concealment. However, plaintiff's pleadings and memoranda fail to delineate the cliamed fraudulent concealment, rendering indiscernible the scope of the alleged concealment. Thus, it remains unclear whether plaintiff is attempting to invoke this doctrine with respect to some, or with respect to all, of his original claims. For example, plaintiff does not appear to suggest that his fraudulent concealment is applicable to any claim under Rule 10(b)(5) which may not concern churning.[3]

The Court is mindful that the applicable statute of limitations would not begin to run before any alleged deceitful conduct should reasonable have been discovered. *Sargent v. Genesco, Inc.*, 492 F.2d 750 (5th Cir. 1974). Where plaintiff's submissions have appropriately reised this issue, plaintiff may proceed. Howerver, defendants are entitled to summary judgment dismissing those claims, otherwise prescribed, regarding which the doctrine of fraudulent concealment has not been pled.

New Orleans, Louisiana, this **6th** day of December, 1985.

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

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[3] The Court has assumed that plaintiff's churning claims may involve an illegal device, scheme or artifice under S.E.C. Rule 10(b)5 and/or Rule 15(c) and 15 U.S.C. § 70o(c)(1) or 78j(b). *See Miley v. Oppendeimer & Co.*, 637 F.2d 318, 324 & n.4, *reh. denied*, 642 F.2d 1210 (5th Cir. 1981); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 890 n.1 & 2 (5th Cir. 1979)(superseded in part by statute as noted in 572 F. Supp. 1180 [N.D. Ga. 1983]).

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH A. ROMANO — **CIVIL ACTION**

V. — **NO. 84-3424**

MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL. — **SECTION "A"**

ORDER AND REASONS

This matter is before the Court upon motion of Merrill Lynch, Pierce, Fenner and Smith, Inc., Merrill Lynch Commodities, Inc., and Merrill Lynch Futures, Inc. [hereinafter "Merrill Lynch"], to dismiss the second amended complaint of Joseph A. Aomano with prejudice for failure to state a claim upon which relief can be granted.

Background

Plaintiff's suit places at issue two types of transactions, occurring between March 1981 and April 1983: (1) Silver commodities trading undertaken on plaintiff's behalf; and (2) Associated deposits and withdrawals from Plaintiff's Ready Assets account, which the parties agree are technically securities transactions.[1] The dates of the relevant commodities trades are listed in paragraph 42 of plaintiff's first amending complaint. The initial deposit of funds into plaintiff's Ready Assets account was made on march 12, 1981. See [Original] Complaint, p. 4, ¶ 13. Thereafter, there were deposits and withdrawals, reflected in certain statements of account made a part of this record in connection with a prior motion by the defendants. These unchallenged records show Ready Assets transactions occurring through March 26, 1982. Plaintiff filed his original complaint on July 12, 1984.

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[1] See generally Memorandum in Support of Motion for Summary Judgment Filed by Defendants Merrill Lynch Ready Assets Trust and Merrill Lynch Asset [sic] Management, Inc. on September 19, 1985 and plaintiff's opposition memorandum filed September 20, 1985.

On April 30, 1986, plaintiff filed a second amended complaint[2] adding certain allegations of RICO violations through a pattern of racketeering activity consisting of fraud and unlawful use of the mails associated with particular commodities transactions specified set forth in paragraph 42 of plaintiff's first amended complaint. See Second Amended Complaint, ¶ 24(C)(b), p. 5. No other transactions are specifically pled as predicate acts, although at hearing on the motion presently under consideration, plaintiff also relied upon the Ready Assets transactions as predicate acts.

This Court previously denied a motion for summary judgment seeking dismissal of plaintiff's Rule 10b-5 claims stated in plaintiff's original and first amending complaints on grounds of prescription in an Order & Reasons entered December 9, 1985. This Court held that a two year prescriptive period governed those claims and that on the face of the complaint any misrepresentations subject to Rule 10b-5 in respect of transactions occurring more than two years prior to the original complaint were time barred. Thus, on the face of the complaint, as amended, all claims as to securities transactions prior to July 1982 were clearly prescribed. moreover, the statements of account in the record confirm prescription of the causes of action as to all Ready Assets transactions.

To counter the defense of prescription, plaintiff raised by memorandum a general claim of fraudulent conceilment of his churning causes of action.[3] Although both the

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[2] Plaintiff filed his motion for leave to file a second amended complaint on March 10, 1986, which this Court granted, reversing the Magistrate's refusal to allow plaintiff to amend the complaint.

[3] As applied to the Ready Assets transactions this allegation is confusing because there is conspicuously absent from plaintiff's pleadings an itemization of the deposits and withdrawals from the Ready Assets account such as would support a claim for churning. In addition, the gravamen of plaintiff's complaints as to his Ready Assets account is that his funds were deposited into Ready Assets without his

complaint as amended and plaintiff's memorandum failed to specify any facts supporting the claim of fraudulent concealment, this Court gave plaintiff the benefit of the doubt and denied the motion to dismiss indicating that where plaintiff properly pled fraudulent concealment, it would serve to prevent dismissal of plaintiff's claims under Rule 10b-5 for churning. All other claims for securities fraud arising prior to July 12, 1982 were therefore deemed prescribed, but this Court purposely left those claims unspecified.

The foregoing resolution of defendants' earlier motion to dismiss was warranted by the relatively early stage of the litigation and the Court's desire that the parties discover fairly what claims, if any, the plaintiff had and what, if any, were the plaintiff's actual damages, rather than prematurely foreclosing litigation of legitimate demands. However, the vagueness and lack of coherency of the plaintiff's pleadings have continuously hampered the Court's efforts to resolve the issues presented to it, and in light of the proximity to the trial date, the Court is now prepared to take a stricter view of plaintiff's inability to clarify his cliams as required by law. The lack of progression in the pleadings and the lack of any development of plaintiff's case have also prompted the Court to reconsider sua sponte its prior rulings on prescription.

Thus, the Court has carefully reviewed the prior submission of the parties, in conjunction with the present motion to dismiss the RICO claims. For reasons stated more fully below, it is ordered that the motion to dismiss on

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(Footnote 3 continued)
authorization in lieu of being held in a noninterest bearing account pending investment. However, plaintiff nad not alleged any damages resulting from this action.

The Court can only speculate that some of the confusion stems from an erroneous assumption that Rule 10b-5, 17 C.F.R. § 240.10b-5, governs commodities transactions, although the rule expressly applies to securities. *See also Moody v. Bache & Co.*, 570 F.2d 523 (5th Cir. 1978).

grounds of prescription be and is hereby granted as to all of plaintiff's claims under Rule 10b-5, including those for churning, and as to plaintiff's RICO claims.[4] To the extent any of the rulings below conflict with the Court's earlier Order & Reasons, the Order is hereby recalled. Plaintiff's RICO claims are also dismissed for failure to properly allege predicate acts.

Prescription

In response to defendants' present prescriptions defense to the RICO cliams, plaintiff again invoked the doctrine of fraudulent concealment generally, as stated in his opposition memorandum. Even through plaintiff has presumably had the benefit of six months of discovery, plaintiff's memorandum fails to delineate the claimed fraudulent concealment. Similarly, his second supplemental complaint does not allege any facts relative to fraudulent concealment, even through the parties are approaching trial of this matter on August 22, and the Court would expect the plaintiff to have available to him sufficient knowledge of the facts of this case to satisfy the Court that the plaintiff's claims of fraudulent concealment are well founded.

As stated in the hearing on defendants' motion, the Court agrees that plaintiff's RICO claims would be governed by the one year limitation period of Louisiana Civil Code article 3492 (formerly article 3536). *See Ingram Corp. v. J. Ray McDermott & Co.*, 495 F. Supp. 1321, 1324 n.4 (E.D. La. 1980), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983): *Moore v. A.G. Edwards & Sons*, CANO 84-5101 (E.D. La. March 13, 1986). *See also Alexander v. Perkin Elmer Corp.*, 729 F.2d 576, 577 (8th Cir. 1984) (per curiam); *Bowling v. Founders Title Co.*, 773 F.2d 1175 (11th Cir.

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[4] As best the Court can tell, this order reserves to the plaintiff his claims under federal law for churning his commodities account. *See generally McGinn v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 736 F. 2d 1254 (8th Cir. 1984). Defendants only raised prescription as a defense to the Rule 10-b-5 claims, and as indicated above, Rule 10b-5 does not govern commodities transactions. See footnote 3.

1985), *cert. denied sub nom. Zoldessy v. Founders Title Co.*, 106 S. Ct. 1516, 89 L. Ed. 2d 915 (1986). Thus, on the fact of the complaint, all of plaintiff's RICO claims have prescribed, and the focal issue is whether plaintiff has sufficiently pled or established entitlement to fraudulent concealment. For reasons stated more fully below, the Court concludes he has not.

An initial hurdle arises in considering whether to evaluate defendants' motion under Rule 12 or Rule 56. Defendants originally invoked Rule 12, but defendants' reliance on Rule 12 does not prevent the plaintiff from introducing matters outside of the pleadings in order to defeat the defendants' motion. Accordingly, the Court considered the pleadings and all materials in the record submitted by the plaintiff to determine whether the plaintiff has stated a claim under RICO. Nevertheless, plaintiff's failure to provide legally admissable evidence opposing defendants' motion would not of itself require the motion be granted: Under Rule 56, the movants have an initial burden of establishing the absence of genuine issues of material fact supporting their cliam, if matters outside of the pleadings are to be considered. *See John v. State of Louisiana*, 757 F.2d 698, 708-09 (5th Cir. 1985). Thus, if plaintiff's pleadings disclose issues of fact, plaintiff need not file counter affidavits or other legally admissible evidence to controvert the motion for summary judgment. *See Thompson v. johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983), *cert. denied* 465 U.S. 1102, 104 S. Ct. 1598, 80 L. Ed. 2d 129 (1984); *White v. Thomas*, 660 F.2d 680, 682-83 (5th Cir. 1981), *cert. denied* 455 U.S. 1027, 102 S. Ct. 1731, 72 L.Ed. 2d 148 (1982).

However, whether the Court considers defendants' motion as a Rule 12 motion to dismiss for failure to state a claim or a Rule 56 motion for summary, judgment it is bound to carefully consider the pleadings in this case to determine whether they disclose any allegations of fact supporting plaintiff's claim for fraudulent concealment. In evaluating the pleadings, this Court is bound by Rule 9 of

the Federal Rules of Civil Procedure, which provides in pertinent part:

> (b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . .
>
> (f) Time and Place.
>
> For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

The Court was unable to uncover any controlling authority indicating what law governs evaluation of the sufficiency of plaintiff's allegations, and the parties did not address this issue in their memoranda. However, the question of prescription was resolved by analogy to state law in *Dupuy v. Dupuy*, 551 F.2d 1005, *reh. denied*, 554 F.2d 1065 (5th Cir.), *cert. denied*, 434 U.S. 911, 98 S. Ct. 312, 54 L. Ed. 2d 197 (1977). Accordingly, the Court has turned to state law to resolve the sufficiency of averments of fraudulent concealment, with reliance upon federal jurisprudence as persuasive.

Under state law, when an action has presscribed on the fact of the complaint, plaintiff bears the burden of proving facts which would have the effect of either interrupting or avoiding prescription. *See Wilkins v. Hogan Drilling Co.*, 471 So. 2d 863 (La. App. 2d Cir. 1985) (securities fraud calims), *citing Henderson v. Todd Shipyards*, 442 So. 2d 242 (La. App. 4th Cir. 1984), *cert. denied*, 462 So. 2d 1266 (La. 1985). The *Wilkins* Court stated that the plaintiff must allege the time of discovery of the cause of action, the circumstances of the discovery, the reason why discovery was not made earlier, and his diligent efforts in seeking discovery. 471 So. 2d at 866. Similarly, it was stated:

> [W]hen a complaint affirmintively indicates that the alleged fraud occurred at a remote time, such

> that it would ordinarily be barred by the statute of limitations, it becomes the duty of the plaintiff who seeks to rely on [an extension of the statutory period because of delayed discovery of the fraud] to affirmatively and particularly plead the date of discovery, as a material everment under F.R.C.P. 9(b), (f), or face dismissal of the complaint.

Stewart Coach Indus., Inc., v. Moore, 512 F. Supp. 879, 886 (S.D. Ohio 1981) (citing cases). Thus, general and conclusory allegations of fraudulent concealment do not sufficiently plead fraudulent concealment. *See Armstrong v. McAlpin*, 699 F.2d 79, 88-90 (2d Cir. 1983). The controlling test is when fraud should be discovered with the existence of due diligence, and accordingly, a plaintiff must plead circumstances that would have given notice of the fraudulent conduct, which circumstances were not discovered because of concealment, and when the fraudulent conduct was discovered.

Thus, the Court rejects plaintiff's contention in his memorandum of September 20, 1985, that the date of discovery of the fraudulent conduct is an issue of fact to be decided by this Court, without any allegation on the plaintiff's part as to what that date was. As a matter of law, the plaintiff must allege fraudulent concealment with particularity, but the pleadings and memoranda in this case give no indication of the time of discovery, the circumstances of discovery, the reason why discovery was not made earlier or plaintiff's efforts in seeking discovery of any of the fraudulent conduct in question. Moreover, as to the date of discovery of any claims concerning Ready Assets transactions, the uncontested affidavit of Robert Harris affirmatively avers that monthly statements reflecting all purchases and/or redemptions of Ready Assets shares during the preceding month are sent to Ready Assets shareholders, such as the plaintiff. Copies of plaintiff's monthly statements are attached to the affidavit, as

previously indicated, and they reflect activity in plaintiff's account only through March 26, 1982.[5] Although plaintiff alleges that he continues to be a shareholder in the Ready Assets trust as of the date of filing of his complaint, the record discloses and plaintiff alleges no transactions in the Ready Assets account beyond that date. Accordingly, the pleadings on their face show that plaintiff has failed to state a claim as to either his securities fraud or his RICO claims, and in addition, defendants have established that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law, dismissing plaintiff's Rule 10b-5 and RICO claims.[6]

The Sufficiency of the Pleadings as to Predicate Acts

The defendants also allege that plaintiff has not properly pled a RICO claim due to his failure to allege predicate acts upon which a pattern of racketeering activity could be found. Plaintiff does not address this contention in his memorandum.

Securities violations may serve as a predicate acts under RICO. *See* 18 U.S.C.A. § 1961(1)(D). However, defendants have asserted that the only claims remaining to plaintiff are his claims for churning his commodities account, and that because commodities are not securities, there are no securities violations upon which to base the RICO claims. *See Chipser v. Kohlmeyer & Co.*, 600 F.2d 1061, 1068 (5th Cir. 1979); *Moody v. Bache & Co.*, 570 F.2d

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[5] Any excessive activity denoting churning would be readily discernible to the plaintiff upon receipt of his monthly statement.

[6] As previously observed by this Court, plaintiff did not appear to suggest that fraudulent concealment is applicable to any claim other than churning, and this Court questions whether the doctrine of fraudulent concealment concerns any alleged RICO violation where the predicate acts are other than churning. Moreover, if the remaining predicate acts are limited to churning commodities,the Court questions whether plaintiff has stated a claim under RICO.

523, 525 (5th Cir. 1978).[7] Plaintiff does not dispute this point and did not address it by memorandum, but contended at oral argument that he has stated a claim under RICO because of his allegations of wrongdoing in connection with the deposits of his funds into a Ready Assets account, which constitute securities transactions.[8]

Inasmuch as the Court has dismissed the plaintiff's securities claims in connection with Ready Assets, however, these transactions cannot now serve as predicate acts.[9]

In sum, the Court finds an affirmative basis in the record for holding that plaintiff's pleadings, submissions and memoranda do not sufficiently state or raise as an issue the doctrine of fraudulent concealment as to any securities tranactions under 10b-5 (the Ready Assets share transactions), and accordingly, claims for damages arising out of any transactions concerning purchase and sale of Ready Assets shares and activity in plaintiff's Ready Assets account have prescribed and are hereby dismissed.

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[7] Additional clarification on this point may be provided by the Fifth Circuit's upcoming decision in *Point Landing, Inc. v. OMNI International, Ltd.*, App. N. O. 84-3445 (argued before the Fifth Circuit sitting en banc on January 16, 1985).

[8] As observed in the Court's Orders & Reasons of December 9, 1985, plaintiff specifically contends that his funds were deposited into Ready Assets without his authorization in lieu of being held in a noninterest bearing account pending investment. However, he alleged no damages resulting from the Ready Assets transactions, and other than the initial deposit, calls into question no particular Ready Assets transactions.

[9] Moreover, as appropriately observ ed by the *Gartenberg* court, the purchase of shares in the Ready Assets trusts are likened to deposits in a regular bank account, and accordingly, the Court would be loathe to hold that Ready Assets shares transactions would form a sufficient basis for predicate acts under RICO. *See Gartenberg v. Merrill Lynch Asset Management, Inc.*, 528 F. Supp 1038 (S.D.N.Y. 1981), *aff'd*, 694 F.2d 923 (2d Cir. 1982) (cited by defendants). Fortunately, the Court need not reach this question.

Likewise, any RICO claims arguably based upon the transactions sstated in the pleadings have prescribed.

Moreover, because commodities trades are not securities transactions, the Court holds that plaintiff's claims arising out of churning his commodities account cannot be made predicate acts under RICO, and the Ready Assets transactions cannot be asserted as predicate acts under RICO inasmuch as those claims have prescribed. Dismissal of plaintiff's RICO claims is therefore appropriate on that basis.

For foregoing reasons, defendants' motions seeking dismissal of plaintiff's RICO claims and Rule 10b-5 claims are hereby GRANTED.

New Orleans, Louisiana, this 1st day of July, 1986.

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED Sep 12, 1986

JOSEPH A. ROMANO — CIVIL ACTION

VS. — NO. 84-3424

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INC., ET AL. — SECTION "A"

ORDER & REASONS

This matter is before the Court upon motion of defendants Merrill Lynch, Pierce, Fenner and Smith, Inc. and Merrill Lynch Commodities, Inc., to dismiss on grounds of prescription certain of plaintiff's claims for churning his commodities account. The motion was heard on July 23, 1986, at which time the parties were invited to file supplemental memoranda, in light of plaintiff's asserted late notice of the hearing.

This Court previously addressed in some detail the question of prescription as applied to plaintiff's Rule 10b-5 and RICO claims in an Order and Reasons dated July 1, 1986, granting partial summary judgment in favor of the defendants. The Court further granted summary judgment on the RICO claims in light of plaintiff's failure to sufficiently allege predicate acts.

Two of the defendants have now raised the viability of plaintiff's claims as to commodities transactions set forth generally by date in paragraph 42 of plaintiff's supplemental and amending complaint.[1] These transactions

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[1] The procedural posture of the case and pertinent facts were stated in the July Order and shall not be repeated in full in this Order.

occurred during March 18, 1981 through March 1983. Certain specific allegations of wrongdoing were elicited during plaintiff's deposition and reflect five incidents:

1. Plaintiff alleges he was improperly advised not to sell his silver and promised that defendant's account executive could put him in a "no risk" position. See, e.g., Plaintiff's deposition, pp. 43-44. The date of the representation is unspecified, nor does plaintiff allege a particular date on which he became aware of any impropriety in these representations.

2. Plaintiff alleges his resultant offsetting position in silver contracts was sold without his consent or authorization. He admits he first became aware of this allegedly improper actrion upon receipt of his monthly statement on an unspecified date. See id. at 126-28.

3. An account executive unjustifiably refused to sell him silver. From the context of the testimony it appears this refusal was communicated on the spot and the communications in question occurred sometime in 1981 or 1982.

4. An account executive failed to follow certain instructions to purchase 10,000ounces of silver on plaintiff's behalf and instead purchased only 5,000, which action became apparent to plaintiff upon his receipt of a statement in "early '82 or late '81". See id. at 71.

5. An account executive purchased a certain futures contract for 1000 ounces of silver over plaintiff's instructions no to, a matter that was the subject of correspondence dated May 14, 1983 and June 13, 1983 between an attorney retained by the plaintiff and a representative of the defendants. The transactions were also reflected in plaintiff's statement after January 11, 1983.

Notwithstanding plaintiff's consultations with,

attorneys to evaluate his claims, suit herein was not filed until July 12, 1984, long after the dates of the transactions in question. However, plaintiff alleges that by reason of retaining an attorney, he was using reasonabale diligence to obtain knowledge of his claims "within one year from filing of suit" even though the attorneys did not advise him about churning or deceptive trading practices.

Against this background, the Court is called upon to decide the applicable limitations period and whether, for any actions prescribed on the face of the complaint, plaintiff has sufficiently established or pled fraudulent concealment. Because of the confusing allegations previously bemoaned by this Court, the Court has evaluated the case both as one of churning plaintiff's commodities account generally and as one raising the specific claims enumerated. above.

The Court first concludes that whether the causes of action for churning and other commodities violations are viewed as implied or as granted by statute under the law effective July 1983, 7 U.S.C. § 25, a two year limitations period should be applied. Movants rely upon district court cases outside Louisiana wherein the courts applied the state fraud statute of limitations to commodities claims, rejecting judicial adoption of the state securities limitations period and the Commodities Act limitation period for administrative remedies, 7 U.S.C. § 18. With reference to Louisiana law, this approach would call for application of a one year limitation period under La. Civ. Code art. 3492, instead of the two year period set forth in the Louisiana securities laws and the Commodities Act. However, in all the cases cited by movants, the courts adopted the longer limitations period, and none concerned a one year fraud limitations period. *See, e.g., Fustsok v. Conticommodity Servs., Inc.,* 618 F. Supp. 1076 (S.D.N.Y. 1985) (six year state fraud limitation period applied). *Bernicker v.Pratt,* 595 F. Supp. 1034 (E.D. Pa. 1984) (six year fraud limitation period applied); *Shelley v. Noffsinger,* 511 F. Supp 687

(N.D. Ill. 1981) (three year state securities law limitation period applied), *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979) (two year limitation period applied). The Court finds further support for its conclusion in the enactment of 7 U.S.C. § 25(d), providing a two year limitation period for commodities causes of action arising subsequent to July, 1983.

The complaint as amended and the deposition testimony show that some of the commodities transactions and specified wrongful acts occurred more than two years prior to filing suit. This Court has previously decided that plaintiff did not sufficiently plead fraudulent concealment[2] so as to prevent dismissal of his Rule 10b-5 and RICO claims, and nothing in the plaintiff's subsequent submissions has satisfied the simple requirement of pleading when he *first* became aware of facts supporting the causes of action in question. Plaintiff merely refers briefly in his supplemental memorandum to ignorance as of July 1983 of the concepts of churning and deceptive practice, even though the letters in the record show plaintiff and his attorney certainly had knowledge of improprieties in connection with the handling of his account, sufficient to put him on notice of some, if not all of his claims.

Plaintiff seeks to circumvent the requirements for pleading fraudulent concealment by reliance upon *Weiser v. Shwartz*, 286 F. Supp. 389 (E.D. La. 1968) (suit under Rule 10b-5 for churning securities). In *Weiser*, the plaintiff became aware that capital he had invested fell sharply, as a result of transactions occurring during 1958 to 1966. Suit was filed in 1967, approximately 15 months after the last

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[2] As discussed in the July Order, plaintiff raised a general claim of fraudulent concealment, which he renews in his supplemental memorandum in opposition to this motion. In reaching its decision, this Court has considered statements in the memorandum as procedurally sufficient to raise the issue of fraudulent concelament in the record, although substantively they still do not satisfy the requisites of FRCP 9 and the authorities previously discussed.

trade on his account. Plaintiff had been receiving daily transaction slips and monthly statements of account, and upon first learning of his capital losses, complained to his stock broker and thereafter consulted a series of lawyers. However, the *Weiser* court found that "it was not until his present attorney had plaintiff's account audited -- within a year before suit was filed -- that Weiser had any evidence on which he could assert a claim that his account had been improperly handled other than the fact that he had lost money." *Id.* at 391. Accordingly, the court rejected defendant's contention that knowledge of the number of transactions gleaned from monthly statements was sufficient to put the plaintiff on notice of churning.

The Merrill Lynch defendants herein distinguish the *Weiser* case on grounds that certain of Mr. Romano's claims are for specified acts of wrongdoing, rather than merely churning a discretionary account. This Court would distinguish this case from *Weiser* in *Weiser's* application of a one year limitation period, which is not in line with more recent authority applying a two year period to Rule 10b-5 claims. In this Court's view, the shorter limitation period provides a justification on policy grounds for more liberal evaluation of plaintiff's efforts to discover h is claims.

In any event, plaintiff has not pled to this Court's satisfaction the particular facts supporting fraudulent concealment as discussed in the more recent authorities mentioned in the Court's July Order and Reasons. Nor is the Court impressed with the allegation that the attorneys failed to deduce whether plaintiff had a cause of action for churning. The question is what facts were available to the plaintiff. Accordingly, the motion for summary judgment is granted in part, dismissing all causes of action for churning or other commodities violations based upon transactions occurring or actions taken more than two years prior to filing this suit. However, the Court declines to specify which churning claims or commodities violations may be prescribed, given the proximity to a July 1982 cut off date

and the time frames alleged and discussed in plaintiff's deposition.

The Court also refuses to reverse its prior rulings dismissing the Rule 10b-5 and RICO claims, for which there are even stronger grounds for dismissal.

New Orleans, Louisiana, this 12 day of September, 1986.

/s/ Charles Schwartz, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED DEC. 23, 1986

JOSEPH A. ROMANO — **CIVIL ACTION**

V. — **NO. 84-3424**

MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL. — **SECTION "A"**

OPINION

SCHWARTZ, J.

This matter comes on for hearing as a bench trial on December 19, 1986. To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as Conclusions of Law; to the extent any of the Conclusions of Law stated below constitute Findings of Fact, they are so adopted.

Introduction

Joseph A. Romano, plaintiff, a citizen of Louisiana opened commodities trading account with defendants, Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Commodities, Inc., and Merrill Lynch Futures, Inc. on March 12, 1981. Merrill Lynch is incorporated under the laws of the State of Delaware, maintains its principal office in the State of New York, and is licensed to and is doing business in the State of Louisiana. Defendant, Merrill Lynch Commodities, Inc., is a foreign corporation incorporated under the laws of the State of Delaware. On January 4, 1983, Merrill Lynch Commodities, Inc. changed its name to Merrill Lynch Futures, Inc.

Plaintiff filed this action July 12, 1984 alleging a variety of security violations by defendant, Merrill Lynch,

its Commodities, Furtures, Asset Management and Ready Assets Trust Divisions. This Court in previous orders (see Order & Reasons filed herein July 1, 1986 and September 12, 1986) held plaintiff's only actionable claim was whether defendant "churned"[1] plaintiff's commodities account during the two-year period preceding the filing of this action.[2]

Plaintiff contends defendant not only "churned" plaintiff's commodity account, but also made unauthorized commodity sales and purchases, failed to properly execute orders directed by plaintiff, failed to disclose to plaintiff a complete listing of activity in plaintiff's account, and placed plaintiff in commodity positions which caused plaintiff to suffer margin calls. Plaintiff contends defendant's activities resulted in substantial damage and loss to plaintiff and thereafter a profit to defendant.

Defendant contends plaintiff was provided regular monthly statements reflecting all account activity during each preceding month and provided confirmation notices after each trade. Defendant contends no unauthorized trades in silver or any other commodities were made in plaintiff's accounts, that plaintiff's accounts were nondiscretionary[3] which he at all times controlled. Finally, defendant asserts plaintiff understood the risk of trading in commodities and sought to invest silver as a result of plaintiff's own belief if would increase in value.

Plaintiff's case in chief constituted of his own

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[1] "Churning" occurs when a broker buys and sells securities in a client's account that do not relate to the client's investment objective but rather are aimed primarily at generating commissions for the broker.

[2] The applicable statute of limitations for plaintiff's churning claim is two years. See Order & Reasons filed herein December 9, 1985.

[3] A nondiscretionary account is one in which an account executive may not make trades for a client's account without first obtaining client approval.

testimony and exhibits.[4] At the close of plaintiff's testimony, defendant moved for an involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b). The Court took the matter under submission and defendant as part of its case rested after eliciting testimony from Patrick Hardy, one of plaintiff's Merrill Lynch account executives. For the foregoing reasons, defendants' motion is GRANTED.

Findings of Fact

Plaintiff is 61 years old, and although his formal education ended with his high school graduation, he testified he has been a successful restauranteur for the last thirty-five years and since 1980 has earned approximately $60,000 per year.[5] Plaintiff contacted defendant's New Orleans Office in March of 1981 for the express purpose of investing in silver futures and was first put in touch with Mr. Mike Grant, a Merrill Lynch Account Executive. Grant requested a financial statement from plaintiff and an initial $10,000 deposit. thereafter, plaintiff bought silver futures contracts and although plaintiff stated he as not satisfied with the initial results he nevertheless followed Grant's suggestion of purchasing additional silver futures. He further testified that after Mr. Grant was transferred to Chicago, he received a letter from Merrill Lynch stating his positions had been sold, but that he had not authorized liquidation of his accounts. Plaintiff did not offer any such letter into evidence nor did he produce any documentary evidence to substantiate the allegation his positions were

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[4] Plaintiff's exhibits 2, 3, 4, 5, 7, 8, 9, 14, 15, 16, 17, 20 and 21 were admitted into evidence; the Court sustained objections to exhibits 1, 6, 10, 11, 12 and 13; plaintiff thereafter proffered them.

[5] In a statement of financial condition dated July 26, 1982, plaintiff lists his total net worth at $287, 500. See defendant's exhibit 5.

sold without authorization.[6]

Moreover, after Mr. Grant's transfer, plaintiff continued to deal with Merrill Lynch and his business was assigned to Account Executive Patrick Hardy. Plaintiff stated Mr. Hardy asked plaintiff to open a discretionary account, i.e., an account whereby Mr. Hardy would have discretion to purchase and sell securities without Mr. Romano's prior approval, but plaintiff rejected the suggestion. Plaintiff alleges he instructed Hardy to purchase $10,000 worth of silver future contracts, but contrary to those instructions Hardy purchased silver contracts worth $5,000. When plaintiff informed Hardy of the discrepancy, plaintiff asserts Hardy then bought the additional $5,000 in contract but it was too late, he lost additional sums of money as a result of Hardy's error. Plaintiff did not produce for the Court a confirmation slip which shows the incorrect order nor does plaintiff claim a specific loss as a result of this alleged transaction. Further, plaintiff failed to direct the Court to a specific account statement which would indicate the loss of which plaintiff complains.[7]

Plaintiff testified Hardy suggested plaintiff recover his silver losses by investing in other futures, a suggestion plaintiff followed.[8] Plaintiff claims at this point he specifically told Hardy not to purchase silver futures but

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[6] Although plaintiff introduced into evidence statements from his different commodity accounts for the duration of plaintiff's dealings with defendant (see plaintiff exhibits 7, 8, 9), plaintiff never indicated to the Court which trade was the purported unauthorized sale. Further, plaintiff has produced no letter to defendant complaining of such trade. As far as the Court can ascertain, the allegation of this unauthorized sale was raised by plaintiff for the first time on the witness stand.

[7] Again it appears plaintiff never complained to defendant in writing of this transaction as no such letter has been introduced into evidence and continued to deal with Merrill Lynch.

[8] Records indicate plaintiff invested in copper futures in late 1982 and during that period plaintiff showed a profit as a result of copper trades. (See plaintiff exhibit 9, pp. 15, 17, 18, 19.)

nevertheless received a slip confirming the purchase of silver. Again, plaintiff does not point to any specific confirmation slip or transaction to substantiate this claim of an unauthorized purchase.

In the end, plaintiff was discouraged with the overall result of his commodity ventures and instructed Mr. Hardy to liquidate his account and forward to him the balance. It is undisputed that Mr. Hardy did, in fact, forward Mr. Romano the balance of his funds held by Merrill Lynch.

Although plaintiff claims he wa duped into purchasing silver for the sole purpose of generationg commissions for Merrill Lynch, this Court finds plaintiff's claims are not substantiated. First, as stated earlier, plaintiff was the initiating force behind his foray into the silvers future market as it was plaintiff who contacted Merrill Lynch. Plaintiff admits it was his idea silver was a good investsment and that he believed he could profit through the silver future markets. Plaintiff stated he reviewed the silver reports in the Times Picayune almost daily during his period of activity in the silver markets. Further, plaintiff admitted when he traded with Mr. Grant, all decisions were his own. In all, plaintiff has testsified that on two specific occasions defendant failed to follow his instructions, and a silver position was sold without his prior approval. However, he did not make any specific allegations as to what losses he suffered as a result of the three alleged incidents nor rebutted the evidence that he received monthly statements from defendant. Quite simply, plaintiff has presented this Court no facts or documentatary evidence to substantiate his allegations that defendant unneceessarily or without authorization traded his account for the purpose of generating commissions.

Conclusions of Law

The Court has subject jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Plaintiff has alleged

defendant traded his commodities account without his permission and that his account wash "churned." In order to substantiate this claim, he has the burden of proving by a preponderance of evidence that (1) the trading in his account was excessive in light of his investment objectives, (2) the broker in question exercised control over the trading in the account, and (3) the broker acted with the intent to defraud or with the willful and reckless disregard for the investor's interest. *Miley v. Oppenheimer & Co., Inc.,* 637 F.2d 318, 324 (5th Cir. 1981). The Court finds that plaintiff has failed to meet his burden of proof. First, it was plaintiff's express objective to invest in silver, plaintiff does not contend defendant initiated his silver ventures. Second, plaintiff testified he had a nondiscretionary account which he controlled. Third, plaintiff produced no evidence that the trading in his account was excessive and defendant intended to defraud plaintiff or acted in willful or reckless disregard of plaintiff's interests. On the contrary, plaintiff testified defendant made investment recommendations aimed at correcting plaintiff's silver losses (see footnote 5). Finally, because plaintiff had a nondiscretionary account, defendant's owed him no fiduciary duty. *Ray E. Friedmann & Company v. Jenkins,* 738 F.2d 251, 254 (8th Cir. 1984).

Federal Rule of Civil Procedure 41(b) provides in pertinent part:

> After the plaintiff, in an action tried by the Court without a jury, has completed, the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the grounds that upon the facts and the law, the plaintiff has shown no right to relief.

Plaintiff has failed to present sufficient evidence that his commodity account was "churned" which would necessitate rebuttal by defendant.

Accordingly, the Clerk of Court is hereby directed to enter a Judgment DISMISSING plaintiff's complaint at his cost.

New Orleans, Louisiana, this 23rd day of December, 1986.

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT

FILED DEC 29 1986

EASTERN DISTRICT OF LOUISIANA

JOSEPH A. ROMANO	**CIVIL ACTION**
VERSUS	**NO. 84-3424**
MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL.	**SECTION "A"**

JUDGMENT

Considering the Court's written Opinion on file, accordingly;

IT IS ORDERED, ADJUGED, AND DECREED, that there be judgment in favor of defendants Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Commodities, Inc., Merrill Lynch Futures, Inc., Merrill Lynch Asset Management, Inc., and Merrill Lynch Ready Assets Trust and against plaintiff Joseph A. Romano, dismissing plaintiff's complaint with prejudice, plaintiff to bear all costs.

New Orleans, Louisiana, this 29th day of December, 1986.

/s/ Loretta G. Whyte
LORETTA G. WHYTE, CLERK

APPROVED AS TO FORM:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY DEC 29 1986

APPENDIX H

JOSEPH A. ROMANO

VERSUS NO. 87-3069

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.
MERRILL LYNCH COMMODITIES, INC.
MERRILL LYNCH FUTURES, INC.
MERRILL LYNCH ASSET MANAGEMENT, INC.
MERRILL LYNCH READY ASSETS TRUST

APPEAL
from

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY BRIEF OF APPELLANT

Stephen J. Caire
510 No. Florida St.
Covington, LA. 70433
Attorney for Appellant
Joseph A. Romano

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TABLE OF CITATIONS

THE SECURITIES CLAIM

This Honorable Court has recently reviewed the effect of the intertwined securities and commodities transactions resulting from the appellee's, Mrrrill Lynch, Pierce, Fenner and Smith, Inc., method of handling its customers funds. *Smoky Greenhaw Cotton* v. *Merrill Lynch, Pierce,* 785 F.2d 1274 (5th Cir. 1986). In that case this Court observed at p. 1277:

> "The only securities in this case were Merrill Lynch's Ready Asset Funds accounts. It was into these accounts that profits from Greenhaw's commodities accounts were transferred in order to purchase securities that would generate returns for Greenhaw; it was also from these accounts that securities were sold to generate funds to meet margin calls in Greenhaw's commodities accounts."

After noting that "Section 10(h) of the Securities Exchange of 1934 generally forbids the use of any manipulation or deceptive device in convertion with the purchase or sale of any security. See 15 U.S.C. § 78j(b)", Judge Brown quoted Rule 10b-5, 17 C.F.R. § 240.106-5 and held:

> "Viewing the evidence in the light most favorable to Greenhaw, as we must with a jury verdict, it is clear that Greenhaw established the necessary elements needed to prove a Rule 10b-5 violation. There was evidence for a jury to find that Merrill Lynch occassionally liquidated portions of the plaintiffs' Ready Asset Funds accounts to finance the unauthorized trades. Merrill Lynch used the telephone lines and the facilities of a national securities exchange to execute its scheme. Finally, in light of the broad interpretation that the courts lend to the "in connection with" requirement, Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12, 92, A.Xr. 165, 169, 30 L.Ed2d 128, 134 (1971); Alley

> v. Miramon, 614 F.2d 1372, 1378 n. 11 (5th Cir. 1980), we hold that the record demonstrates a sufficient connection between Merrill Lynch's fraud and the sale of the securities."

The District Judge admonished plaintiff's counsel that the Merrill Lynch Ready Assets transactions were ". . . the most ridiculous part of your case . . ." (Transcript p. 36 and cited at p. 14 of appellees' brief). A colloquy then followed (Transcripts pp. 36-38) wherein the District Judge stated his conclusions regarding the lack of significance that three (3) security accounts had been opened with MLPF&S in plaintiff's name. (Plaintiff's Exhibits Nos. 3, 4, 5). Plaintiff's Exhibit -3 & -4 show that plaintiff was still a shareholder as of July 27, 1984 in an amount of $4.11, which amount had been reported monthly since July 31, 1981. No interest is shown as earned during that three year period. The colloquy concludes as follows: (Transcript p. 37 lines 14-25 & p. 38 lines 1-4)

> MR. CAIRE: Your Honor, there have been statements made concerning the interest or dividends to Mr. Romano which were beneficial to him, and I believe Your Honor has just stated quite emphatically your conclusion in that regard. There is no evidence in this case, and I don't think there will be that Mr. Romano ever benifitted from those purchases. And that the only purpose of this line of questioning, which I'm really I'm finished with.
>
> THE COURT: Mr. Forrester, you made a representation now. Do you mean Merrill Lynch put his money in Merrill Lynch Asset trust and didn't give him the interest on his money?
>
> MR. FORRESTER: Certainly. Didn't give him the interest?
>
> THE COURT: Yes.
>
> MR. FORRESTER: Oh, certainly we gave him the interest.

> THE COURT: Of course. I'm sure you did. Don't make a statement like that, Mr. Caire, if it is not true.

The truth is that the Merrill Lynch Ready Assets transactions were the purchase and sale of securities. (Stipulation of Counsel, Transcript p. 3 lines 19-25 and p. 4 line 1). There was no deposit on which the plaintiff earned interest. Yet, appellees' brief at pp. 3 & 4 in its statement of fact again suggests that the funds were "placed in an interest bearing money market fund (Ready Assets Account)". Plaintiff's proffered exhibit No. 13 shows the involvement of appellee, Merrill Lynch Asset Management, Inc., advising plaintiff, as a shareholder of the Merrill Lynch Ready Assets Trust, of:

> "A negative adjustment to your statement (August 27) occurs on days where weakness in the short-term money market results in a decline in portfolio value which exceeds interest earned for the day . . . "

Interestingly enough, neither at trial nor in brief did appellees point to the amount of "interest" they claimed was given to plaintiff. Nowhere did they produce evidence of any benefit to the plaintiff. They did not because they could not.

On the contrary, the evidence (Plaintiff's proffered Ex. No. 13) identifies a loss to the plaintiff and specifically explains:

> " . . . Holdings in the Trust for a short period of time can experience some volatility in total return . . . "

The unauthorized purchases and sales of securities by MLPF&S with plaintiff's funds established holdings in the Trust for only short periods of time. Plaintiff was thus exposed to the "volatility" of those securities transactions. The plaintiff's testimony is clear. He did not authorize any securities transactions. (Transcript p. 34 lines 6-14.) Accordingly all of the securities transactions were a violation of

Rule 10b-5. Additionally, since Merrill Lynch occassionally liquidated portions of plaintiff's Ready Assets Funds to finance unauthorized commodities trades, the holding of this Honorable Court in Smoky Greenhaw Cotton, supra, applies:

> "... We hold that the record demonstrates a sufficient connection between Merrill Lynch's fraud and the sale of securities."

THE RICO CLAIM

Appellees acknowledge that the recent decision of the Supreme Court of the United States requires reversal of the Distsrict Judge's dismissal of plaintiff's RICO action by application of a one-year prescriptive period. *Agency Holding Corp., et al v. Malley-Duff & Associates*, 55 U.S.L.W. 4952, 4956 (June 22, 1987). See Brief of Appellees, p. 21 footnote 5. Appellees maintain however, that plaintiff's RICO claim was properly dismissed for failure to properly allege a RICO cause of action, stating in brief at p. 22:

> "Merrill Lynch simply has no clue as to what Mr. Romano was attempting to plead, and each subsection of §1962 has its own unique requirements of *pleading* and *proof*. . ." (emphasis added)

No authority is cited for the above quoted conclusion of appellees.

Plaintiff's second amended complaint contains the RICO allegations. On the first page, paragraph 5.(A) clearly states the basis for the claim as fraud in the sale of securities. On page 2, paragraph 14 of the original complaint is amended to allege the unauthorized purchase of securities issued by the Merrill Lynch Ready Assets Trust. On page 3, paragraphs 24. (A), 24. (B), and 24. (C) were added to allege the specific conduct and identified that conduct with securities transactions by reference to other

paragraphs of the complaint. There is nothing unique about this style of pleading. A copy of the second amended complaint was inadvertantly omitted from the record excerpts and is attached as an appendix to this reply brief in lieu of quoting the language.

In *Smoky Greenhaw Cotton*, supra at p. 1280, this Honorable Court considered the issue of the sufficiency of the allegations necessary to state a claim under RICO. In that case Judge Brown recognized that "the Supreme Court swept away many of the limitations read into RICO's statutory language by the lower courts." The Court quoted the pertinent language of *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 holding that the statute requires no more than an allegation of each element, namely (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The Court's reasons for reversal of the District Judge did not involve a complicated analysis of "unique requirements of pleading and proof"; rather, the Court's reason was only one simple sentence:

> "In this case, Greenhaw's second amended complaint contains each of the allegations necessary to state a claim under RICO . . . "

The allegations of appellant's second amended complaint, paragraph 24. (C) allege that the fraud in the sale of securities were those associated with the commodities transactions specifically pleaded in paragraph 42 of the first amended complaint. This Court's holding in *Smoky Greenhaw Cotton*, supra at p. 1278, is conclusive that such conduct represents a sufficient connection with fraud and the sale of securities.

THE FEDERAL RULES OF EVIDENCE

Much has been said about the inability of the plaintiff to particularly identify transactions. Didn't the plaintiff do enough? Was a simple, unsophisticated investsor required to anticipate fraudulent conduct and keep a log of his telephone conversations? Was he to keep a detailed journal

and ledger?

His testimony is clear and convincing that material misrepresentation were made, i.e. the "no-risk contract" and that unauthorized transactions were made with his funds. It is unreasonable to expect him to produce detailed documentation. Clearly, he has carried his burden of proof by a preponderance of-the-evidence standard.

The District Judge applied the clear and convincing, or stricter, rule of evidence. In doing so he committed reversible error because the plaintiff need only prove that it is more likely than not that he was defrauded. *Herman and MacLean* v. *Huddlestson,* 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed. 2d 548.

In doing so, the plaintiff can rely upon the Federal Rules of Evidence and particularly Rule 302, which provides:

> "In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State Law."

State law presumes, from the failure of defendants to appear and testify, that their testimony would be detrimental to their case. (Citations supplied in original brief of appellant at p. 28)

Accordingly, the plaintiff has established and proved his special damages. Additionally, the damages recoverable from RICO are those resulting from a "pattern" and are not limited to isolated damages on each transaction taken individually. *Sedima,* supra.

CONCLUSION

When reviewing the claim for a breach of fiduciary duty in Smoky Greenhaw Cotton, supra, this Honorable Court considered, but drew no distinction between, the non-discretionary commodities account and the discretionary securities account. The Court recognized the fiduciary claims without regard to the nature of each account. Thus, there is no basis for the District Judge's distinction to deprive the plaintiff of the fiduciary duty owed to him. In making that distinction, the District Judge committed reversible error.

Respectfully submitted,

/s/ Stephen J. Caire

STEPHEN J. CAIRE
Attorney for Appellant
Joseph A. Romano

Certificate of Service

I hereby certify that I have this date mailed a true and correct copy of the foregoing instrument to all counsel for opposing parties by addressing the same to their last known post office address, by U.S. Postal Service.

This the 5th day of August, 1987.

/s/ Stephen J. Caire

STEPHEN J. CAIRE

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

JOSEPH A. ROMANO	CIVIL ACTION Filed April 30'86
VERSUS	NO. 84-3424
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. MERRILL LYNCH COMMODITIES, INC., MERRILL LYNCH FUTURES, INC. MERRILL FYNCH ASSET MANAGEMENT, INC. MERRILL LYNCH READY ASSETS TRUST	SECTION "A" MAG. 4 SECOND AMENDED COMPLAINT

Plaintiff, under authority of the scheduling order rendered in the above numbered and entitled procedings, which order was signed on the 9th day of January, 1986, filed and entered on January 13, 1986, amends his complaint previously filed herein on July 12, 1984 as amended on October 12, 1984, by amending, adding to and inserting allegations in the following respects:

By adding an additional paragraph following paragraph 5. to be numbered paragraph 5.(A) as follows:
5.(A) This Court has jurisdiction of and over the subject matter of the claims asserted by plaintiff herein and of and over the person of each of the defendants by reason of the provisions of the Racketeer Influenced And Corrupt Organizations Act (RICO), 18 U.S.C. sections 1961-1968, in that the claims asserted herein by plaintiff are based upon and arise out of the conduct of defendants in violation of section 1962 of the Racketeer Influenced And Corrupt Organizations Act by conduct of an enterprise through a pattern of racketeering activity involving fraud in the sale of securities.

By amending paragraph 14. to read as follows:

14. The funds identified in the preceeding paragraph were accepted by defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. and by said defendant used to purchase securities issued by Merrill Lynch Ready Assets Trust, and which investment in securities was made by the said defendant without the knowledge or consent of the plaintiff, and, further, without the disclosure required by and in violation of the laws of the United States specifically set forth hereinabove.

By amending paragraph 16. to read as folows:
16. As a result of the investment of plaintiff's funds by the defendant, Merrill Lynch, Pierce, Fenner & Smith, in securities issued by Merrill Lynch Ready Assets Trust, the plaintiff is a shareholder of Merrill Lynch Ready Assets Trust.

By adding an additional paragarph following paragraph 23. to be numbered paragraph 23.(A) as follows:
23.(A) the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., acted as an investment advisor to the plaintiff by making verbal solicitations directed to the plaintiff with the objective that as investment advisor the said defendant would manage the investment of plaintiff's idle funds, and, said defendant did in fact manage the investment of plaintiff's idle funds by purchasing securities issued by the Merrill Lynch Ready Assets Trust; and, the said defendant further received special compensation for its transactions with the Merrill Lynch Ready Assets Trust from the Merrill Lynch Ready Assets Trust and the payment of said special compensation was a cause of the value of plaintiff's shareholder's investment in the trust to fluctuate downward, thus causing damage to plaintiff.

By adding additional paragraphs following paragraph 24. to be numbered paragraphs 24.(A), 24.(B),and 24.(C) as follows:
24.(A) the conduct, acts and omissions of the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., which resulted in substantial damage and loss to the plaintiff and further resulted in profit to the said defendant in consequence of

the scheme of events constituting violations of the Investment Advisors Act of 1940, are, but not limited to, as follows:

a) Providing an Exchange for the trading of securities issued by Merrill Lynch Ready Assets Trust:

b) Unlawful use of the mails to provide investment advisory services;

c) Acting as a broker for a person other than its client, the plaintiff, more specifically for Merrill Lynch Ready Assets Trust to effect the sale of plaintiff's securities without disclosing to the plaintiff, its client, in writing prior to the transaction:

d) By acting for both the advisory client, plaintiff, and for another person on the other side of the transaction;

e) By receiving special compensation from Merrill Lynch Ready Assetes Trust, in connection with the sale of plaintiff's securities when Merrill Lynch Ready Assets Trust was the other person on the other side of the transaction.

24.(B) The conduct, acts, and omissions of the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., which resulted in substantial damage and loss to the plaintiff and further resulted in profit to the said defendant in consequence of said defendant's fraud in the sale of securities consisted of the following misrepresentations:

a) On or about June 1, 1981 when plaintiff announced his intention to discontinue trading in silver, the account executive employed by the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc. and assigned by the said defendant to transact business in plaintiff's account, solicited further business from the plaintiff by making false and misleading statements that if plaintiff continued to maintain a position in silver that there would be no risk involved because

the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., would sell to plaintiff a "no risk contract";

b) By making false and misleading statments concerning Merrill Lynch Ready Assets Trust, and specifically falsely stating and misrepresenting that the Merrill Lynch Ready Assets Trust was an interest bearing account where plaintiff's funds were deposited for the purpose of earning interests for him, when in truth and in fact the use by the said defendant of plaintiff's funds constituted an investment in securities issued by Merrill Lynch Ready Assets Trust.

24.(C) The conduct of Merrill Lynch, Pierce, Fenner & Smith, Inc., which resulted in substantial damage and loss to the plaintiff and further resulted in profit to the said defendant, was the formation of an enterprise consisting of a union or association in fact of the said defendant with defendants Merrill Lynch Commodities, Inc., Merrill Lynch Futures, Inc. and Merrill Lynch Ready Assets Trusts through a pattern of racketeering activity consistsing of fraud in the sale of securities associated with the particular transactions specifically set forth in paragraph 42. of plaintiff's amending petition, and which securities were issued by defendant Merrill Lynch Ready Assets Trust. The profits to the defendants and the losses to the plaintiff resulting from the pattern of racketeering activity conducted by the said enterprise is as follows:

a) The defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., profitted by the receipt of special compensation from the defendant, Merrill Lynch Ready Assets Trust for each transaction specifically pleaded in paragraph 42;

b) The conduct of the enterprise which constituted a pattern of racketeering consisted of those acts specifically set forth in paragraphs 24, 24.(A), and 24.(B) in connection with those transactions specifically set forth in paragraph 42. and in any manner related or associated with those said transactions.

c) As a result of the pattern of racketeering engaged

in by the enterprise the plaintiff has suffered special damages as itemized in paragraph 41; additionally, the plaintiff suffered unreasonable dalays in the return of funds to him by defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. because of the necessity to return the funds through the process of selling securities issued by Merrill Lynch Ready Assets Trust. These dalays allowed the defendant Merrill Lynch Ready Assets Trust to use plaintiff's funds after the demand for the return of the funds had been made upon the defendant, Merrill Lynch, Pierce, Fenner & Smith, Inc., who violated its fiduciary duty to the plaintiff by not returning the funds of plaintiff as expeditiously as possible, the result of which was that plaintiff suffered the loss of the use of his funds during those said delays;

d) The pattern of racketeering engaged in by the enterprise in the purchasing and selling of securities issued by Merrill Lynch Ready Assets Trust resulted in benefits and profits to defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. at the expense of the plaintiff for the reason that the churning of plaintiff's account was an illegal device, scheme or artifice by said defendant's account executives in reckless disregard for plaintiff's investment objectives in favor of the generating of a significant number of transactions, the number of which determined the special compensation which was received by defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. from defendant, Merrill Lynch Ready Assets Trust.

By inserting an additional transaction in paragraph 42. of plaintiff's amended complaint as follows:
42. Date: 09/27/82 ...buy; 2...Mar 83...89100.

By adding an additional paragraph following paragraph 42. to be numbered paragraph 43. as follows:
43. As a consequence of the violation of 18 U.S.C. § 1962 by defendants in conducting an enterprise through a pattern of racketeering activity as specifically pleaded hereinabove, the plaintiff has been injured in his business

and property by reason of said violations and is therefore entitled to recover threefold the damages he has sustained and the cost of the suit, including a reasonable attorney's fee.

WHEREFORE, plaintiff, Joseph A. Romano, prays that this, his second amended complaint, be filed and be deemed good and sufficient and that after due proceedings had, prays that there be judgment in his favor and against all defendants, Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Commodities, Inc., and Merrill Lynch Futures, Inc. as prayed for in the original complaint filed in these proceedings and, additionally, in the amount of $300,000.00 and the cost of the suit, including a reasonable attorney's fee.

Respectfully submitted,

/s/ Stephen J. Caire

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NO. 87-1603

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH A. ROMANO,

Petitioner,

VERSUS

MERRILL LYNCH, PIERCE, FENNER & SMITH, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RULE 28.1 LIST OF RELATED COMPANIES

The parent company of respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch Asset Management, Inc., and Merrill Lynch Futures, Inc. is Merrill Lynch & Co., Inc.

The subsidiaries of Merrill Lynch, Pierce, Fenner & Smith, Inc. are Broadcort Capital Corp., Merrill Lynch & Co., Canada Ltd., Merrill Lynch Canada Inc., Merrill Lynch Life Agency Inc., Merrill Lynch Princeton Inc., Securities Options Corp., and Wagner Stott Clearing Corp.

The subsidiaries of Merrill Lynch Assett Management Inc. are Merlease Leasing Corp., and Merrill Lynch Interfunding Inc.

TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), Merrill Lynch Commodities, Inc. (Merrill Lynch Commodities), Merrill Lynch Futures, Inc. (Merrill Lynch Futures), Merrill Lynch Asset Management, Inc. (MLAM), and Merrill Lynch Ready Assets Trust (MLRAT), (hereinafter collectively referred to as "respondents") in opposition to the petition of Joseph A. Romano for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

STATEMENT OF THE CASE

Mr. Romano initiated this case on July 20, 1984, in the federal court in the Eastern District of Louisiana.

[1] The decision of the court of appeals in *Romano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 834 F.2d 523 (5th Cir. 1987), is *reprinted as* Appendix A of Mr. Romano's petition (hereinafter cited as "Appendix A") at A-1.

A class action was alleged in the complaint. The defendants named were Merrill Lynch, Merrill Lynch Futures, Merrill Lynch Commodities,[2] MLAM, and MLRAT.

Mr. Romano alleged vaguely in his complaint that MLRAT and its manager MLAM violated the securities laws by entering some sort of a conspiracy with the other defendants to churn or otherwise mishandle his funds in the silver futures market after withdrawal from his MLRAT account. He alleged that this claim was shared with a class consisting of other Merrill Lynch customers. Additionally, he claimed that Merrill Lynch and Merrill Lynch Futures "churned" commodity transactions in his account. Damages of $50,000 were alleged without the slightest reference to specific defendants or transactions.

Finding Mr. Romano's individual claim against them to be incomprehensible -- not to mention that of the so-called class alleged to be similarly situated -- respondents initially filed a motion for a more definite statement.

The trial judge granted the motion and Mr. Romano filed an Amended Complaint in which he simply listed seventy-five commodities trades in his account. No additional factual allegations clarifying his claims were made in the Amended Complaint. No violation of the Commodity Exchange Act has ever been alleged in the pleadings.[3]

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[2] On January 4, 1983, Merrill Lynch Commodities, Inc. changed its name to Merrill Lynch Futures, Inc.

[3] Mr. Romano's claims were plagued by confusion and inadequate pleading from the beginning of this litigation. In fact, the trial judge stated in his order of July 1, 1986 (*reprinted as* Appendix D of Mr. Romano's petition (hereinafter cited as "Appendix D") at A-23), that the "vagueness and lack of coherency of the plaintiff's pleadings" and the "lack of development in plaintiff's case continuously hampered the court's effort to resolve the issues presented to it." *Romano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 638 F. Supp. 269, 271 (E.D. La. 1986), Appendix D at A-25.

Mr. Romano then moved for certification of the class. Respondents opposed certification of the class and MLRAT and MLAM moved for a summary judgment dismissing the claims against them. Additionally, Merrill Lynch and Merrill Lynch Futures moved for a partial summary judgment in their favor dismissing that portion of Mr. Romano's claim in so far as it was based on specific trades occurring prior to the period provided by the statute of limitations.

The trial judge considered all of these matters and denied certification to the class and dismissed the claims against MLRAT and MLAM. Additionally, the trial judge in three different orders dated December 6, 1985 (*reprinted as* Appendix C of Mr. Romano's petition (hereinafter cited as "Appendix C") at A-15), July 1, 1986 (*reported in Romano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 638 F. Supp. 269 (E.D. La. 1986) and *reprinted as* Appendix D of Mr. Romano's petition (hereinafter cited as "Appendix D") at A-23), and September 12, 1986 (*reprinted as* Appendix E of Mr. Romano's petition (hereinafter cited as "Appendix E") at A-33), granted partial motions for summary judgment in favor of Merrill Lynch and Merrill Lynch Futures based on the statute of limitations.

Belatedly, over a year and a half after filing his Complaint and after the case had been set for trial, Mr. Romano filed a Second Amended Complaint which attempted to allege RICO violations. Merrill Lynch and Merrill Lynch Futures initially objected to the tardy filing of the RICO claim and the Magistrate dismissed it. However, Judge Schwartz reversed the Magistrate after Mr. Romano appealed and permitted the RICO claim to be filed. Ultimately, however, Judge Schwartz dismissed the Rico claim before trial on the basis of prescription and inadequate pleading.

A bench trial on the merits was held at which time the trial court considered the claim of Mr. Romano for churning of his commodities account. Mr. Romano, who conceded that he controlled the transactions in the account, could not specifically indentify a single transaction in his account which was unauthorized. Likewise, he presented no evidence of any specific loss attributable to the fault of respondents. After he had submitted his evidence, on the motion of respondents pursuant to Fed. R. Civ. P. 41(b), the trial court dismissed Mr. Romano's claim for lack of evidence demonstrating that he was entitled to any relief. *See* trial court opinion, Appendix F at A-39.

Mr. Romano appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals in its opinion discussed the "elusive" arguments of Mr. Romano in the light of the specific facts in the case and unanimously affirmed the decision of the district court. Apparently unhappy about the resolution of the issues by both the district and appellate courts, Mr. Romano now petitions this Court for a writ of certiorari for further review.

CRITERIA OF SUPREME COURT RULE 17 NOT MET

As a threshold matter it is clear from the face of Mr. Romano's petition for a writ of certiorari that the considerations set forth in Supreme Court Rule 17 are not present in this case.

Mr. Romano's petition presents no "special and important reason" for which this Court should exercise its discretion to review this matter. There is no indication from the petition that the Fifth Circuit Court of Appeals rendered a decision in conflict with a decision of another federal court of appeals on the same matter or in conflict with applicable decisions of a state or this Court, or that the Court of Appeals in its opinion so far departed from the

accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, Nor does Mr. Romano's petition disclose any substantial issues of federal law which have not been, but should be, settled by this Court. To the contrary, the questions presented for review by Mr. Romano are either unsupported and patently spurious issues or relate only to the application or well-settled law by the trial and appellate courts to the particular facts of this case.

DISCUSSION OF QUESTIONS PRESENTED FOR REVIEW

Though it is clear that Mr. Romano has not met his initial obligation to allege appropriate considerations for seeking this Court's review, respondents will briefly address Mr. Romano's contention that errors occurred in the proceedings below.

Respondents' response is hindered by the fact that Mr. Romano has continued his practice of presenting elusive, vague and wholly unsupported arguments. Indeed, we note that several of the ten questions presented for review are either not mentioned at all in his argument or they are so cursorily addressed that a separate response to each issue is not possible. We note further that insofar as Mr. Romano has raised issues and then completely failed to develop or support them in his argument that he has clearly violated Supreme Court Rule 21.5 which imposes on a petitioner the burden of presenting with "accuracy" and "clearness" support for issues raised.

a. Argument that District Judge Martin Feldman is disqualified from sitting on the Court of Appeals

Mr. Romano's first argument is that the participa-

tion by United States District Judge Martin Feldman on the Fifth Circuit Court of Appeals in this matter is improper because he is not authorized by law to sit on the Fifth Circuit and in any event he should be disqualified because of his alleged participation in formulating local pleading rules for RICO suits.

Mr. Romano cannot seriously dispute that the common practice of designating district judges to sit on the courts of appeals is specifically authorized by 28 U.S.C. §292(a) and that there is no authority holding such a statute unconstitutional. Likewise, it is equally frivolous for him to argue that Judge Feldman should be disqualified based on an allegation that he is somehow biased because of alleged participation in the formulation of local pleading rules. There is nothing in the record to even indicate what if anything Judge Feldman did with regard to formulating RICO pleading rules. But even assuming arguendo that he did assist in the formulation of such rules and that the rules reflect his legal opinion on proper RICO pleading, it is settled that this is no basis for his disqualification. A judge's view on legal issues has generally not been deemed sufficient to justify disqualification. *See United States v. Conforte,* 624 F.2d 869, 882 (9th Cir.), *cert. denied,* 449 U.S. 1012 (1980); *United States v. Azhocar,* 581 F.2d 735, 738 (9th Cir. 1978), *cert. denied,* 440 U.S. 907 (1979).[4]

We observe also that Mr. Romano raised his objection directed to Judge Feldman for the first time in his petition for a writ of certiorari to this Court after the case was decided. Obviously, Mr. Romano should not be permitted

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[4] Reference by Mr. Romano to *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813 (1986), is misplaced. In that case a justice on the Alabama Supreme Court was disqualified from sitting on a case involving an insurance company where the justice had a personal suit pending at the same time against another insurance company in which similar issues of law were involved.

to submit his appeal to the panel which heard the case and after learning of an unsuccessful result, complain that a district judge sitting by designation on the panel did so improperly or without authority. Mr. Romano had ample opportunity to challenge Judge Feldman's participation on the panel prior to decision of the case yet he failed to do so.

b. Argument that claims by Mr. Romano and the alleged class against MLRAT and MLAM were improperly dismissed

As best can be summarized, the second error alleged by Mr. Romano is that the securities laws and RICO claims against MLRAT and MLAM should not have been dismissed pursuant to their motions for summary judgment.[5] Mr. Romano alleged that MLRAT and MLAM were somehow responsible under the securities laws for Mr. Romano's (and the class members') losses in the silver market because (in concert with the other respondents) they withdrew money from MLRAT accounts and invested it in unsuitable and/or unauthorized silver investments to their sole benefit. He also argues that placing his idle funds in a MLRAT account created a claim for damages under the securities laws. Additionally, he attempted to allege in his Second Amended Complaint that the alleged violations of the securities laws by MLRAT and MLAM constituted predicate acts under the RICO statute.

In asserting claims against MLRAT and MLAM it is clear that Mr. Romano totally misconceived the functions of MLRAT and MLAM. Both of those parties moved for summary judgment based on uncontradicted facts set forth in affidavits, prospectuses and in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 528 F. Supp. 1038 (S.D.N.Y. 1981), *aff'd*, 694 F.2d 923 (2nd Cir. 1982), *cert.*

[5] Mr. Romano's assertion that it was error to dismiss the claims against MLRAT and MLAM appear to be broken down separately as items 3,4,5,8 and 10 in his "Questions Presented For Review."

denied, 461 U.S. 906 (1983).

The Fifth Circuit considered Mr. Romano's claims against these parties and found from the record, as did the trial judge, that it was "clear that neither MLRAT nor MLAM was in any way even remotely involved in Mr. Romano's silver futures trades." Appendix A at A-7. Furthermore, both courts found that it appeared that Mr. Romano actually benefited from the investment of his idle funds in his MLRAT account, and could show no loss. *Ibid.* at n.10. Thus, finding the motions for summary judgment of MLRAT and MLAM to have merit and the record barren of any evidence asserted in opposition to the motions for summary judgment, the Fifth Circuit properly affirmed the trial court's judgment dismissing MLRAT and MLAM.

Having found that Mr. Romano's securities laws claims against MLRAT and MLAM had no merit, the Fifth Circuit then concluded that he and the alleged class had no basis for alleging MLRAT transactions as predicate acts under the RICO statute.[6] Accordingly the Fifth Circuit affirmed the trial court's dismissal of the RICO claims based on alleged securities law violations.

c. Argument that statute of limitation was improperly applied to churning claim

The next argument advanced by Mr. Romano is that the Fifth Circuit erred in affirming the trial court's application of the statute of limitations to Mr. Romano's commodities churning claim.

Specifically, Mr. Romano takes issue with the conclusion reached by the trial and appellate courts that the

[6] The Fifth Circuit found that Mr. Romano failed to meet the requirements of class certification. *See* Appendix A at A-13. He could not identify other class members or any common questions of fact or law. Indeed, his inability to show any loss of his own qualified him as a class representative.

statute of limitations commenced to run against his churning claim when he received notice of the commodities transactions in his account through the receipt of confirmation notices and monthly statements. In rejecting Mr. Romano's argument, the Fifth Circuit noted that in applying the statute of limitations in churning cases, a court should consider the entirety of transactions and the sophistication of the plaintiff in each case. It then noted that Mr. Romano was "not an unsophisticated investor" who was caught unaware of the trading activity in his account. Appendix A at A-9. Indeed, he had directed the activity in the account himself. Furthermore, the Fifth Circuit noted that respondents had raised the statute of limitations defense through a motion for summary judgment and that Mr. Romano had not exercised his opportunity to oppose the motion by presenting evidence of his ignorance of the facts. In connection with its application of the statute of limitations to Mr. Romano's claims, the Fifth Circuit made it clear that it was not announcing any new principle of law, but that its decision was based only on the facts of this case. *Ibid.* The court said:

> Our decision today is fact-specific and deals only with the facts in this record. The district court also ruled only on the facts.

Ibid. at n.12.

d. Argument that improper commodities trading violates RICO statute

The next issue raised by Mr. Romano is that the trial court erred as a matter of law in stating in its order dated July 1, 1986, that improper activity in his commodities account could not constitute a predicate act under the RICO

statute.[7] Appendix D at A-32. While it is true that the trial court reached this conclusion in its July 1, 1986 order when it dismissed Mr. Romano's RICO claim based on commodities trading, Appendix D at A-32, the correctness of that decision is now moot because at the trial Mr. Romano could prove no underlying improper activity in his commodity account which would constitute a predicate act (assuming arguendo that the RICO statute applies to commodity trading.)

The Fifth Circuit, in its footnote 8, Appendix A at A-5, specifically dealt with this isue, and properly held that since Mr. Romano had completely failed to prove any churning in his commodities account the RICO issue was moot.

e. Argument that Merrill Lynch breached a fiduciary duty to Mr. Romano

Finally, Mr. Romano alleges that Merrill Lynch breached a fiduciary duty owed to him by handling his transactions in the silver futures market without disclosing that Merrill Lynch was a defendant in a lawsuit entitled *Minpeco S.A. v. ContiCommodity Services, Inc.*, 552 F. Supp. 327 (S.D.N.Y. 1982) wherein it is alleged that Merrill Lynch and others engaged in improper activity in the silver market.

This contention is apparently an after-thought by Mr. Romano and there is no evidence in the record relating the issues in that lawsuit to the trading in Mr. Romano's account.

Reference to the cited opinion of the district judge in

[7] 18 U.S.C. §1961(1)(D) specifically provides that securities laws violations can serve as RICO predicate acts. No mention is made in the RICO statute of commodities laws violations serving as predicate acts.

the *Minpeco* case has no evidentiary significance since it deals solely with preliminary motions to dismiss filed by several of the defendants challenging the adequacy of the plaintiff's pleadings. There are no findings in that opinion of any culpability by Merrill Lynch. Hence, there can be no basis for any fiduciary duty owed to Mr. Romano to disclose the subject matter of the allegations in the *Minpeco* case.

CONCLUSION

Respondents consider that it is beyond doubt that the claims asserted by Mr. Romano, which have now been rejected by both the trial and appellate courts, are totally without merit and do not warrant review by this Court.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

Dated: New Orleans, Louisiana
May 25, 1988

CERTIFICATE OF SERVICE

I hereby certify that copies of the Respondents' Brief in Opposition were served on all parties of record by depositing same in the United States mail, first-class postage prepaid and properly addressed to Stephen J. Caire, 218 E, Gibson Street, Covington, Louisiana 70433, this 25th day of May 1988.

WILLIAM R. FORRESTER, JR.